No. 88-512-CSY
Status: GRANTED

Title: Michigan, Petitioner
v.
Tyris Lemont Harvey

Docketed:
September 21, 1988

Court: Court of Appeals of Michigan

Counsel for petitioner: Baughman,Timothy A.

Counsel for respondent: Morgan,Robert M.

Entry	Date	Note	Proceedings and Orders
1	Sep 21 1988	G	Petition for writ of certiorari filed.
2	Oct 26 1988		DISTRIBUTED. November 10, 1988
3	Nov 14 1988	P	Response requested -- BRW, HAB. (Due December 14, 1988)
5	Dec 6 1988		Order extending time to file response to petition until January 28, 1989.
6	Jan 27 1989		Brief of respondent Tyris Lemont Harvey in opposition filed.
7	Jan 27 1989	G	Motion of respondent for leave to proceed in forma pauperis filed.
8	Feb 1 1989		REDISTRIBUTED. February 17, 1989
9	Feb 21 1989		Motion of respondent for leave to proceed in forma pauperis GRANTED.
10	Feb 21 1989		Petition GRANTED.
			**********
12	Apr 3 1989		Order extending time to file brief of petitioner on the merits until April 21, 1989.
13	Apr 21 1989		Brief amicus curiae of United States filed.
14	Apr 21 1989		Brief of petitioner Michigan filed.
15	Apr 21 1989		Joint appendix filed.
17	May 16 1989		Order extending time to file brief of respondent on the merits until June 3, 1989.
18	May 17 1989		Brief amici curiae of ACLU, et al. filed.
19	Jun 3 1989		Brief of respondent filed.
20	Jul 12 1989		CIRCULATED.
21	Jul 20 1989		SET FOR ARGUMENT WEDNESDAY, OCTOBER 11, 1989. (1ST CASE)
22	Aug 28 1989		Record filed.
		*	Certified copy of original record received.
23	Oct 11 1989		ARGUED.

88-512

No.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

THE STATE OF MICHIGAN
Petitioner

v.

TYRIS LEMONT HARVEY
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

John D. O'Hair
Prosecuting Attorney
County of Wayne

Timothy A. Baughman
Chief of the Criminal Division
Research, Training and Appeals
1441 St. Antoine
Detroit, MI 48226
(313)224-5792

28 pp

STATEMENT OF THE QUESTION PRESENTED

I

MAY A DEFENDANT BE IMPEACHED WITH A STATEMENT TAKEN IN VIOLATION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL UNDER MICHIGAN V JACKSON?

TABLE OF CONTENTS

INDEX OF AUTHORITIES

NO.
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1988

THE STATE OF MICHIGAN
Petitioner

v.

TYRIS LEMONT HARVEY
Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

NOW COMES the State of Michigan, by John D. O'Hair, Prosecuting Attorney for the County of Wayne, and Timothy A. Baughman, Chief of the Criminal Division, Research, Training and Appeals, and prays that a writ of certiorari issue to review the judgment of the Michigan Court of Appealst entered in the above cause on May 18, 1988, leave denied by the Michigan Supreme Court on August 24, 1988 with three justices dissenting.

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is appended as Appendix A. The order of the Michigan Supreme Court denying leave to appeal is appended as Appendix B.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on May 18, 1988. The order of the Michigan Supreme Court was entered on August 24, 1988. The jurisdiction of this Court is invoked under 28 USC 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in pertinent part, that in all criminal prosecutions the accused shall have the

right to "the assistance of counsel in his defense."

The Fourteenth Amendment provides, in pertinent part, that no person shall be deprived of liberty without "due process of law."

STATEMENT OF THE CASE

The pertinent facts are well-stated in the opinion of the Michigan Court of Appeals:

"Following a bench trial, defendant was convicted of two counts of first degree criminal sexual conduct (CSC), MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). Defendant was sentenced to six to ten years imprisonment for each CSC; the sentences ran concurrently. Defendant appeals as of right. We reverse.

Only the victim and defendant testified at trial. While the victim testified that defendant beat and raped her, defendant testified that the victim agreed to perform sexual favors in exchange for cocaine. Defendant conceded that he hit the victim, but claimed that

it was only after she had threatened him and struck him.

After defendant was arrested, he made a statement to the police at 8:50 a.m. on July 2, 1986, apparently before he was arraigned. The statement was recorded by a police officer and does not indicate whether defendant was advised of or waived his Miranda v [Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)] rights. While defendant signed the first page of the three-page statement, he refused to sign the last two pages because the officer "wrote some stuff [he] didn't like ... something that wasn't pertaining to what happened." Defendant then asked for an attorney.

Defendant was arraigned on July 2, 1986, and counsel was appointed. On September 9, 1986, six days before trial,

defendant told another police officer that he wanted to make another statement, but he didn't know if he should talk to his lawyer. The officer told him that he didn't need to talk to his lawyer because his lawyer was going to get a copy of the statement anyway. Defendant then signed a constitutional rights waiver form. Defendant initialed the following rights: (1) I have the right to remain silent and I do not have to answer any questions put to me or make any statements; (2) I have the right to have an attorney (lawyer) present before and during the time I answer any questions or make any statements; and (3) if I cannot afford an attorney (lawyer), one will be appointed for me without cost by the court prior to any questioning. Defendant did not initial the following rights: (1) any statement I make or anything I say will be used against me in a Court of Law and

(2) I can decide at any time to exercise my rights and not answer any questions or make any statement. When asked if he understood his constitutional rights, defendant responded: "Yes." Defendant then gave a detailed statement different from his first statement, but essentially similar to his trial testimony.

At trial, the prosecutor did not use the statements in her case in chief. When defendant testified, the prosecutor used the statements made on the first page of the first statement to impeach defendant. Defendant was impeached without objection. When the prosecutor attempted to impeach defendant with the second statement, defense counsel objected. The prosecutor conceded that the second statement could not be used in her case in chief because it was taken in violation of defendant's Miranda rights;

however, she argued that she could use it for impeachment purposes because it did not appear to be involuntary, citing Harris v New York, 401 US 222; 91 S Ct 643; 28 L Ed 1 (1971). Defense counsel had no objection to the prosecutor using the second statement for impeachment purposes; however, he apparently believed that the second statement was identical to defendant's trial testimony and, therefore, could not be used to impeach defendant. The prosecutor used the statement to impeach defendant by pointing out that defendant had failed to include some of his trial testimony in the second statement even though it was only given six days earlier."

The Court of Appeals reversed on the ground that Respondent was impeached with a confession taken in violation of Michigan v Jackson, 475 US 625, 106 S Ct

1404, 89 L Ed 2d 631 (1986). The court stated that "this statement was also made in violation of defendant's Sixth Amendment right to counsel....A statement so acquired may not be used for any purpose, including impeachment. See Meadows v Kuhlman, 812 F 2d 72 (CA 2, 1987), cert den ___US___; 107 S Ct 3188; 93 L Ed 2d 676 (1987); United States v Brown, 699 F 2d 585 (CA 2, 1983)." The court also noted that "Michigan law is consistent. People v Gonyea, 421 Mich 462 (1984)" (slip op at 3).

The People applied for leave to appeal to the Michigan Supreme Court, observing that the ground of decision in Gonyea was not settled, and was on federal grounds. Three justices there found a violation of the Michigan Constitution, three justices found that the state law basis was a "pretext for evading review by the United States Supreme Court" and disagreed on

the merits, and one justice found a Sixth Amendment violation, and that "Under these facts, I concur with my brother Williams' conclusion that the statement in question is inadmissible for any purpose." 426 Mich at 482-483 (emphasis added). (Petitioner would note that the decision here was based solely on the Sixth Amendment, and that in Gonyea, then, only three of seven justices viewed the matter under the state constitution, with three viewing the state law consideration as a pretext to attempt to evade review by this court). Leave was denied on August 24, 1988, with three justices dissenting.

REASONS FOR GRANTING THE WRIT

Petitioner would first dispell any possible claim that the decision below rests on state grounds. The Michigan Court of Appeals expressly held that "this statement was also made in violation of defendant's Sixth Amendment right to counsel. See e.g., Michigan v Jackson, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986), affirming 421 Mich 39 (1984). A statement so acquired may not be used for any purpose, including impeachment. See Meadows v Kuhlman, 812 F2d 72 (CA 2, 1987), cert den ___US___; 107 S Ct 3188; 93 L Ed 2d 676 (1987); United States v Brown, 699 F 2d 585 (CA 2, 1983)." Thus, the Court of Appeals cited two federal cases which turn on the Sixth Amendment. The Court of Appeals also stated that "Michigan law is consistent. People v Gonyea, 421 Mich

462; 365 NW2d 136 (1984)." Gonyea was a 3-1-3 decision. Three justices found that impeachment with a confession taken in violation of the right to counsel violated the State Constitution; three justices found the state law basis of this holding to be a "pretext for evading review by the United States Supreme Court" and disagreed on the merits, and one justice found a Sixth Amendment violation, and that "Under these facts, I concur with my brother Williams' conclusion that the statement in question is inadmissible for any purpose." 426 Mich at 482-483 (emphasis added). Thus, a majority of the Court addressed the question under the Sixth Amendment, disagreeing on the application of the Sixth Amendment to the facts.

Petitioner submits that the issue presented is an unsettled one of significance to the jurisprudence to the

nation. In People v Gonyea, 421 Mich 462; 365 NW2d 136 (1984) the dissenting justices found that the federal courts appear split on the question of impeachment with statements obtained in violation of the Sixth Amendment right to counsel, see opinion of the Court of Appeals, and Gonyea, dissenting opinion of Justice Ryan, 421 Mich at 491. Moreover in dissenting from the denial of certiorari in Lucas v New York, 474 US 911 (1985) Justice White observed that:

> The issue presented in this case is whether the prohibition established in New Jersey v Portash, 440 US 450; 59 L Ed 2d 501; 99 S Ct 1292 (1979), against using a statement obtained from a criminal defendant in violation of his Fifth Amendment right against self-incrimination for impeachment purposes applies equally to statements taken in violation of the Sixth Amendment right to counsel. The United States Court of Appeals for the Second Circuit in United States v Brown, 699 F2d 585 (1983), and the Tenth circuit in United States v McManaman, 606 F 2d 919 (1979) (pre-Portash), have answered this question in the affirmative. The Appellate Division of the Supreme Court of New York in

> the present case, 105 App Div 2d 545, 481 NYS2d 789 (1984), and the New York Court of Appeals in New York v Ricco, 56 NY2d, 437 NE2d 1097 (1982), however, have given the opposite answer. I would grant certiorari to resolve this conflict.

Petitioner would also note that Meadows v Kuhlmann, 812 F2d 72 (CA 2, 1987), cited by the Michigan Court of Appeals, disagreed on this point with People v Meadows, 477 NE2d 1097 (1985), which had relied on New York v Ricco, 437 NE2d 1097 (1982), cited in Justice White's dissent from the denial of certiorari in Lucas v New York. Certiorari was denied in Meadows v Kuhlmann, but in that case the Second Circuit had gone on to find the error harmless.

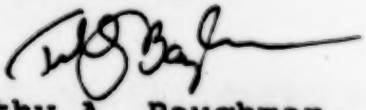
Petitioner submits that this Court should grant plenary review and resolve this important question.

CONCLUSION

WHEREFORE, for the reasons above stated, Petitioner submits that plenary review should be granted.

Respectfully submitted,

John D. O'Hair
Prosecuting Attorney
County of Wayne



Timothy A. Baughman
Chief of the Criminal
Division, Research,
Training and Appeals
1441 St. Antoine
Detroit, MI 48226
(313)224-5792

APPENDIX A

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN
Plaintiff-Appellee,

v **NO. 96420**

TYRIS LEMONT HARVEY **5/18/88**
Defendant-Appellant.

Before: H. Hood, P.J., and J.H. Gillis and M.B. Breighner,* JJ.

PER CURIUM

Following a bench trial, defendant was convicted of two counts of first degree criminal sexual conduct (CSC), MCL 750.520b(1)(e); MSA 28.788(2)(1)(e). Defendant was sentenced to six to ten years imprisonment for each CSC; the sentences ran concurrently. Defendant appeals as of right. We reverse.

Only the victim and defendant

---

*Retired circuit judge, sitting on the Court of Appeals by assignment.

testified at trial. While the victim testified that defendant beat and raped her, defendant testified that the victim agreed to perform sexual favors in exchange for cocaine. Defendant conceded that he hit the victim, but claimed that it was only after she had threatened him and struck him.

After defendant was arrested, he made a statement to the police at 8:50 a.m. on July 2, 1986, apparently before he was arraigned. The statement was recorded by a police officer and does not indicate whether defendant was advised of or waived his Miranda v Arizona, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966)] rights. While defendant signed the first page of the three-page statement, he refused to sign the last two pages because the officer "wrote some stuff [he] didn't like ... something that wasn't pertaining to what happened."

Defendant then asked for an attorney.

Defendant was arraigned on July 2, 1986, and counsel was appointed. On September 9, 1986, six days before trial, defendant told another police officer that he wanted to make another statement, but he didn't know if he should talk to his lawyer. The officer told him that he didn't need to talk to his lawyer because his lawyer was going to get a copy of the statement anyway. Defendant then signed a constitutional rights waiver form. Defendant initialed the following rights: (1) I have the right to remain silent and I do not have to answer any questions put to me or make any statements; (2) I have the right to have an attorney (lawyer) present before and during the time I answer any questions or make any statements; and (3) if I cannot afford an attorney (lawyer), one will be appointed for me without cost by the court prior to

any questioning. Defendant did not initial the following rights: (1) any statement I make or anything I say will be used against me in a Court of Law and (2) I can decide at any time to exercise my rights and not answer any questions or make any statement. When asked if he understood his constitutional rights, defendant responded: "Yes." Defendant then gave a detailed statement different from his first statement, but essentially similar to his trial testimony.

At trial, the prosecutor did not use the statements in her case in chief. When defendant testified, the prosecutor used the statements made on the first page of the first statement to impeach defendant. Defendant was impeached without objection. When the prosecutor attempted to impeach defendant with the second statement, defense counsel objected. The prosecutor conceded that

the second statement could not be used in her case in chief because it was taken in violation of defendant's Miranda rights; however, she argued that she could use it for impeachment purposes because it did not appear to be involuntary, citing Harris v New York, 401 US 222; 91 S Ct 643; 28 L Ed 1 (1971). Defense counsel had no objection to the prosecutor using the second statement for impeachment purposes; however, he apparently believed that the second statement was identical to defendant's trial testimony and, therefore, could not be used to impeach defendant. The prosecutor used the statement to impeach defendant by pointing out that defendant had failed to include some of his trial testimony in the second statement even though it was only given six days earlier.

Defendant claims that the first page of the first statement could not be used

to impeach him because it was taken in violation of his Fifth and Fourteenth Amendment rights. We disagree because we do not believe defendant's first statement was involuntary. New Jersey v Portash, 440 US 450; 99 S Ct 1292; 59 L Ed 2d 501 (1979); Mincey v Arizona, 437 US 385; 98 S Ct 2408; 57 L Ed 2d 290 (1978); Oregon v Hass, 420 US 714; 95 S Ct 1215; 43 L Ed 2d 570 (1975); Harris, supra. We agree with the Michigan cases holding similarly. See, e.g., People v Esters, 417 Mich 34; 331 NW2d 211 (1982); People v Paintman, 139 Mich App 161; 361 NW2d 755 (1984), lv den 422 Mich 931 (1985).

If defendant's second statement was made only in violation of his Fifth Amendment Miranda rights, we would hold likewise; however, this statement was also made in violation of defendant's Sixth Amendment right to counsel. See

e.g., Michigan v Jackson, 475 US 625; 106 S Ct 1404; 89 L Ed 2d 631 (1986), affirming 421 Mich 39 (1984). A statement so acquired may not be used for any purpose, including impeachment. See Meadows v Kuhlman, 812 F2d 72 (CA 2, 1987), cert den ___US___; 107 S Ct 3188; 93 L Ed 2d 676 (1987); United States v Brown, 699 F 2d 585 (CA 2, 1983). Again, Michigan law is consistent. People v Gonyea, 421 Mich 462; 365 NW2d 136 (1984). However, the admission of such testimony may be harmless. Meadows, supra; Brown, supra. Because this case involved a credibility contest between defendant and the victim, we cannot say that the error was harmless beyond a reasonable doubt. See, e.g., People v Gee, 406 Mich 279; 278 NW2d 304 (1970).

Reversed.

/s/Harold Hood
/s/John H. Gillis
/s/Martin B. Breighner

APPENDIX B
MICHIGAN SUPREME COURT

ORDER
Entered: August 24, 1988

83447

PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellant,

v **SC:83447**
COA:96420
LC:86-04667

TYRIS LEMONT HARVEY
Defendant-Appellee.

On order of the Court, the application for leave to appeal is considered, and it is denied, because we are not persuaded that the question presented should be reviewed by this Court.

Riley, C.J., Brickley and Boyle, JJ, would grant leave to appeal.

I, CORBIN R. DAVIS, Clerk of the Michigan Supreme Court, certify that the foregoing is a true and complete copy of

the order entered at the direction of the court.

August 24, 1988 /s/Corbin R Davis

88-512

NO. 88-5112

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1988

STATE OF MICHIGAN,

Petitioner,

v.

TYRIS LEMONT HARVEY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

RESPONDENT'S BRIEF IN OPPOSITION

Robert M. Morgan (P23144)
2180 Penobscot Building
Detroit, MI 48226
(313) 961-7070

Attorney for Respondent

COUNTERSTATEMENT OF QUESTION PRESENTED FOR REVIEW

WHETHER THE RECORD BELOW IS ADEQUATE FOR THIS COURT TO DETERMINE IF A STATEMENT OBTAINED IN VIOLATION OF BOTH MIRANDA v ARIZONA AND THE SIXTH AMENDMENT WAS TRULY VOLUNTARY AND APPROPRIATELY USED TO IMPEACH RESPONDENT.

TABLE OF CONTENTS

PUBLISHER'S NOTE:

PAGE NUMBER(S) 3 COULD NOT BE LOCATED.

COUNTERSTATEMENT OF THE CASE

Respondent Tyris Lemont Harvey was arraigned on charges contained in the criminal complaint on July 2, 1986. A $20,000 cash bond was set. Respondent, an indigent person, was remanded to the Wayne County Jail where he remained incarcerated throughout the pendency of the proceedings. An attorney was appointed by the court to represent Respondent and on July 10, 1986, Respondent, with appointed counsel, waived his statutory right to a preliminary examination. He was bound over for trial.

Although Respondent's bond was later reduced to $20,000-10%, he remained in custody. His non-jury trial commenced September 15, 1986.

Contrary to the per curiam, unpublished opinion of the Michigan Court of Appeals, five (5) witnesses testified at the trial. These included the complainant and Respondent.

The complainant explained that she knew Respondent for three or four months before the alleged offense. (35, 36) She met him when a neighbor brought him to her home to borrow the pipe she uses to smoke crack cocaine. (36, 37) The complainant smokes crack cocaine one or two times a week, but testified she did not use drugs that day. (32) The complainant testified she was sexually assaulted by Respondent. (26) She reported the incident to the police approximately two days later. (28, 29)

Respondent testified that he went to the complainant's home about 9:00 p.m. (97) They smoked cocaine and he later asked if she would exchange sexual favors for more cocaine. (98, 99) He went with the complainant's sister to get more cocaine. (99) The complainant did not provide the sexual favors, they argued and fought. (99, 100) Respondent denied any sexual act. (108)

During cross-examination, the prosecutor utilized a statement made by Respondent to the police on July 2, 1986 in an effort to impeach Respondent. (110, 112) Then the prosecutor utilized a statement apparently made by Respondent to a police officer during the week before trial. (116-121) Contrary to the Michigan Court of Appeals opinion, the trial record does not indicate that Respondent signed a constitutional rights waiver form nor does it indicate that Respondent initialed any rights on such a form. The prosecutor conceded a Miranda violation. (116) No testimony was offered concerning any of the circumstances surrounding the taking of the statement other than the fact it was made and Respondent made it because he felt he was not guilty of the crime. (116) The only impeachment concerned the dollar amount of cocaine ($30, $50 or $80) (116-119), whether Respondent remembered the name of another man who had also gone to buy cocaine and Respondent's omission in the September 9, 1986 statement that the other man had purchased his own cocaine. (119-121)

REASONS FOR DENYING THE WRIT

The trial record is insufficient for this Court to review the question as framed by Petitioner. This is not a case where the use of a statement taken in violation of Miranda v Arizona, 384 US 436, 86 S Ct 1602; 16 L Ed 2d 694 (1966), and the Sixth Amendment was necessary to prevent those constitutional violations from being perverted into a license for perjury as in Harris v New York, 401 US 222; 91 S Ct 643; 28 L Ed 2d 1 (1971). Respondent did not make a confession and then take the witness stand asserting innocence. The impeachment related primarily to an omission.

The trial record is silent concerning when Respondent's court appointed counsel first became aware that his incarcerated client made a second statement to the police a mere six days before trial and two months after counsel was appointed by the court. The trial prosecutor characterized the circumstances about the statement in this manner:

> MS. HICKEY: Why? Your Honor, I will stipulate it was not subject to proper Miranda and, therefore, I could not have used it in my case in chief.
>
> I talked to the woman that took the statement and my indication is that Defendant indicated that he wanted to give a statement but he didn't know if he should talk to his lawyer. She told him he didn't need to talk to his lawyer, his lawyer was going to get a copy of the statement anyway.
>
> That's why I did not choose to use it in my case in chief. And, I did advise counsel of that. There is no indication that it was involuntary and under Harris vs New York, I may, therefore, use it to impeach, even if improper Miranda is existing in this case. (116, 117)

When the trial court inquired if there was an objection,

Respondent's counsel replied:

> MR. WELTON: Yes, I do have objections, if she is going to use it, as long as she is going to use it not for substantive evidence. If she is going to use it for the proper purpose, well, I want to know how she is going to use it for the proper purpose. (117)

The prosecutor then used the statement briefly for impeachment. It is unclear what Respondent's counsel considered "the proper purpose". What is clear, however, is that the taking of the statement was in contravention of both Miranda and Sixth Amendment. And Respondent respectfully suggests that it would be unfair to presume that the statement was purely voluntary. Respondent's counsel did not challenge the characterization by the prosecutor.[1] No effort was made to make any inquiry at all concerning circumstances revolving around the taking of the statement. The record is almost completely barren of facts concerning the full extent of the police officer's conduct, the Respondent's physical condition, level of intelligence or mental condition. The prosecutor's comment that the police officer allegedly told Respondent he didn't need to talk to his lawyer, clearly raises the specter of involuntariness.

Respondent respectfully submits that in order for this Court to effectively balance the "incremental deterrence of police illegality against the strong policy against countenancing perjury"[2], there should be a trial record or evidentiary hearing record with a full exposition of facts conducive to such an important and difficult task. Here there was not.

---

[1]This critical failure by appointed counsel may have been because, as the Michigan Court of Appeals concluded, "he apparently believed that the second statement was identical to defendant's trial testimony..."

[2]New Jersey v Portash, 440 US 450, 458; 99 S Ct 1292; 59 L Ed 2d 501 (1979)

CONCLUSION

For these reasons, Respondent respectfully requests that this Honorable Court deny the petition for a writ of certiorari.

Respectfully submitted,

Robert M. Morgan (P23144)
2180 Penobscot Building
Detroit, MI 48226
(313) 961-7070

Dated: January 15, 1989

RMM-828/edd

88-512

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

THE STATE OF MICHIGAN
Petitioner,

vs.

TYRIS LEMONT HARVEY
Respondent.

ON WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

JOINT APPENDIX

WAYNE COUNTY PROSECUTOR'S OFFICE
TIMOTHY A. BAUGHMAN*
Chief of Research, Training and Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792
Counsel for Petitioner

ROBERT M. MORGAN*
2180 Penobscot Building
Detroit, MI 48226
Phone: (313) 961-7070
Counsel for Respondent

* Counsel of Record

PETITION FOR CERTIORARI FILED
September 21, 1988
CERTIORARI GRANTED, February 21, 1989

TABLE OF CONTENTS

DOCKET ENTRIES

7/2/86: Arraignment on warrant

7/10/86: Preliminary examination waived

7/17/86: Arraignment on information

7/17/86: Order of discovery granted

7/25/86: Defense motion for polygraph granted

8/15/86: Motion for discovery of medical records of complainant at county expense granted

9/8/86: Writ of habeas corpus for purpose of polygraph test issued

9/15/86: Waiver trial held, defendant convicted

9/25/86: Defendant sentenced, 6-10 years

5/18/88: Conviction reversed by Michigan Court of Appeals

8/24/88: Leave to appeal denied to the Prosecution by the Michigan Supreme Court, three justices dissenting

TESTIMONY OF TYRIS LEMONT HARVEY

called by the Defense, sworn by the Clerk, testified:

DIRECT EXAMINATION

BY MR. WELTON:

Q State your name for the record, please.

A Tyris Lemont Harvey.

Q And, Mr. Harvey, you heard the testimony of Audrey Sharp?

A Yes.

Q On June 11 of 1986, did you have occasion to see Audrey Sharp?

A What you mean, like an appointment or something?

Q Well, did you see her at all --

A Yes.

Q -- on that particular day?

A Yes.

Q How is it that you had occasion to see her?

A I was walking through the alley by her house and seen her standing on the porch. So I went up there.

Q You saw her standing on her porch?

A Yes.

Q What time of day was this?

A It was about nine, nine at night.

Q Nine at night?

A Uh-hum.

Q Did there come a time you went to her house?

A Yes.

Q What time was that?

A I just -- when I just went over there. That's when I went over there.

Q This was nine o'clock?

A Yes.

Q It wasn't 2:30 in the morning?

A No.

Q Were you alone?

A Yes.

Q Were you -- did you approach her house?

A Yes.

Q Okay. Was she still on the porch when you approached?

A Yes.

Q Did you walk upon the porch?

A Yes.

Q Did you say anything to her?

A I asked her how she was doing She said, "All right." And I asked her, "Did she want to smoke some caine?" She said, "Yes".

Q Did you say anything else to her?

A Not until after we got inside.

Q When did you go inside?

A After I asked her did she want to smoke some caine. She said, "Yes", and then she opened the door and then we went in.

Q Okay. Then what did you do next?

A We started smoking and then I asked her did she want to turn some favors and she said yes. So, by that time her sister came in. I don't know if it's her sister. She told me it was her sister. She came in. So she wanted to smoke some, too.

So, I said, "why don't we go get some more." So her sister took me around to the crack house to get some more caine. We bought some more and we came back. By the time we got back it was this other dude sitting there. So he had some caine, too. So we were all sitting there smoking some caine. But, he came there for her sister and then they left.

So me and Audrey was sitting there and I asked her, I said, "What's up? You going to turn that favor?" And she was, "I ain't doing nothing."

And then I said, "I already done paid you." Then she said, "Well, you got to leave." So, I told her I wasn't going nowhere until after she paid me some of my money back or some caine or something.

So, she walked over to the stove and she grabbed a fork and she told me to get out. So, I told her I wasn't going to leave. So, she cut me on my hand right here with the fork. So I hit her in her eye. So, by then we just got to tussling and stuff.

So then I tried to grab the fork from her and I turned her around like this and tried to pull it with the other hand like this and she started biting me on my arm. So, I bit her on her back. So, I broke the fork aloose from her and threw her and she went running into the living room. So, I came in there behind her.

So then she started talking about some dude was upstairs or something and I better leave or something. So then I said, "I wasn't going nowhere until you paid me."

So, by that time, she just took off her pants and got on the couch. So then I went over there and she started trying to jack me off. But, I was so high I couldn't get hard or nothing. So then she started talking all crazy and stuff talking about, "well, why don't you just get up and leave or something."

So, she was like trying to push me, so I hit her again. So I hit her again. Then she started screaming talking about whoever he was upstairs, come on down or something. So, I got up and told her, "Just let me out." So she opened the door and I left.

Q This person that you referred to as her sister, how -- why did you feel that it was her sister?

A Because Audrey told me it was her sister.

Q When did she tell you that?

A A couple times. See, when I first met her, I met her over at the caine house where everybody be smoking at and they came in together. And she said this was her sister. She introduced her. I forgot what she said her name was though.

Q So, was this person who you thought was her sister, was she on foot when she came or did you know?

A Yes, she came in a car. She had a black Volkswagon.

Q You say you and she left together?

A Yes, we went -- after she came -- see, I had like about one more route left, so we went to go get some more. So

she said she would drive me around to the crack house. So, I said, "All right". And, she drove me around there.

Q How long were you gone?

A About, anywhere between five and ten minutes.

Q So, wherever you went was very close to her house?

A Yes, it was a few blocks.

Q So, you are saying that she agreed to exchange sexual favor with you if you were to buy this cocaine so they could get high or you and she could get high?

A Yes.

Q Had you ever gotten high with her before off of this cocaine?

A Yes.

Q And where did that take place?

A At the crack house.

Q Was it ever at her house?

A I don't -- yes, I got high with her before at her house one time.

Q Was anybody there besides you and she?

A Me, her, Ruby and some other dude.

Q Is Ruby someone you had brought with you or was there when you got here or what?

A No. Ruby is her next door neighbor.

Q Now, you said this was at nine o'clock and not 2:30 in the morning, is that right?

A Yes.

Q Did you use her phone while you were there?

A I don't know if she's got a phone. I never seen a phone over to her house.

Q So then you did not use a phone?

A No.

Q How long a period of time were you actually there?

A I will say from about nine o'clock til about something after ten, about an hour, hour and a half.

Q Is that total, the complete time that you left and came back?

A Yes, that is total.

Q So, you say you were there until about 10:30 at the latest?

A Yes.

Q Now, did you recall seeing some garden shears at the house?

A I don't recall the garden shears.

Q So, did you ever have possession of those shears?

A No, I didn't ever have possession of no shears.

Q You don't know if they were there, is that your testimony?

A Yes.

Q The barbecue fork, when was the first time you saw that?

A When she picked it up off the stove.

Q Okay. Why did she pick it up off the stove?

A Trying to make me leave with it.

Q Did she lock a gate behind you when you came in?

A Yes.

Q Is that a steel gate with a key you have to use from the top?

A Yes, Armour Guard.

Q Okay. Once you got in her house, you asked her to get high, is that your testimony? You asked her if she wanted to smoke some caine, is that it?

A Yes.

Q Does that mean "Get high"?

A Yes.

Q And you are saying she agreed to do that?

A Yes.

Q All right. Now, when was it that she agreed to exchange the sexual favors with you?

A Right after I asked her did she want to get high and I asked her did she want to smoke something for some favors. She said yes.

Q Was this before you left to go get additional cocaine or was this afterwards?

A This was before.

Q Before you left the first time?

A Yes.

Q Now, where were you and she when you were having this conversation with her about going to get the cocaine and exchanging sexual favors?

A In her kitchen.

Q You were in the kitchen?

A Yes.

Q Were you face-to-face sitting down or what?

A Yes.

Q Well, sitting down or standing up?

A She was like -- she got one of those tables. I was like on this side and she was like right here, like kind of facing me diagonally.

Q So, were you sitting down?

A Yes.

Q So when did she get the fork?

A When she told me to leave. She told me I had to leave and I told her I wasn't. She just got up, went over to the stove and got it.

Q What did you do when she got the fork?

A I stood up. I told her I wasn't going nowhere, and she started doing like this in my face, told me I had to go and she cut me with it. So then I hit her.

Q Where did he hit her?

A I hit her in her eye.

Q With your fist?

A Yes.

Q Did she fall down?

A No, she didn't fall. I didn't hit her that hard.

Q Well, did she make any noise, sounds of any kind?

A No.

Q When you hit her what did she do next?

A She came back at me with the fork. So, I grabbed her hand and we got to tussling. So, I was trying to get the fork from her and I turned her around trying to pull the fork. And she started biting me so I bit her back.

Q Where did she bite you; where did she bite you?

A She bit me on my arm right here.

Q Your right or left arm or what?

A Right arm.

Q And she -- what did you do after she bit you?

A I bit her back.

Q Where did you bite her?

A On her back.

Q Okay. After you bit her on her back, what was the next thing that took place?

A I bit her and then, I had got the fork from her and I threw her like that and then I pushed her away. And then she ran for the living room.

Q Did you follow her into the living room?

A Yes, I followed her in there.

Q What exactly happened in the living room?

A Then she kept talking about I had to leave and I told her I wasn't going to leave until she paid me. So then she got on the couch. She pulled her pants down and got on the couch. So I went over by the side. I kneeled down. I had pulled my pants down. She started trying to jack me off.

Q How was she trying to do this?

A She was pulling on my penis like this.

Q With her hand?

A Yes.

Q And what happened next?

A So then, I couldn't get hard because I was real high and stuff. And she got all mad and stuff. And she kept -- she started back telling me, "Why don't I just leave." Then that's when she started calling for that dude.

Q What was she doing, screaming out a name, someone to come? What was she saying?

A Yes, she was screaming and pushing on me and stuff, talking about -- and then she said "Johnny." Or something like "Johnny, come on down," something because, you know -- hollering for somebody.

Q No one came, is that correct, after she hollered for this Johnny, this person?

A No, didn't no one come.

Q What happened next?

A I told her, "Just let me out." And she went over to the door and let me out.

Q What -- did she have to go get some keys to let you out?

A No, the keys were sitting right there with her. She always keep them with her. She just went over there and unlocked the door.

Q Was the keys on her person or laying on a table or what?

A I think they were laying on the coffee table.

Q So, she picked up the keys, went to the door, opened the gate?

A Yes.

Q And let you out?

A Yes.

Q So did you and she at any time ever have any sexual intercourse?

A No.

Q Did you at any time try to force her to have any?

A No.

Q What she did do, based on your testimony, did she do voluntarily?

A Yes.

Q Did you ever flip her on the ground, on the floor of the house?

A No, I never flipped her.

Q Were you ever on the landing into the basement?

A No.

Q But you were in the kitchen?

A Yes.

Q And it was some tussling going on in the kitchen?

A Yes.

Q You ended up out in the living room?

A Yes.

Q You never went toward the basement or in the basement area of the landing?

A No.

Q Now, you said she took -- in the living room she took her pants off. Did she take them off, all the way off? What did she do?

A She took them off.

Q She took them off? They weren't on one leg or anything like that?

A Not that I recall. I think she just took them off.

Q Did you take your pants off?

A Mines, I pulled them down.

Q Did you leave after she asked you to leave and she opened the gate? Did you just leave out of the home at that time?

A When she opened the gate --

Q The gate.

A -- yes, I left. I went home.

Q Did you see her dress herself again before she let you out? Did she redress?

A Yes, I think she put her pants back on, yes.

Q So, you waited for her to put her pants back on?

A Yes.

Q And to get the keys to let you out?

A Yes.

Q Nothing took place during that time?

A No.

Q Have you ever been convicted of any felony?

A No.

Q Is today the first time you ever seen those shears that you see sitting on the table?

A Yes.

MR. WELTON: I have no further questions.

CROSS-EXAMINATION

BY MS. HICKEY:

Q Mr. Harvey, you gave a statement to the police in this matter on July 2, did you not?

A Yes.

Q And that would have been to this Officer, this investigator here, correct?

A Yes.

Q And, she wrote that statement down as she asked you a question and you gave her an answer, correct?

A Yes.

Q After she got done writing down what she had, she would show you -- she would let you read it, didn't she?

A Yes.

Q And is that your signature on the first page of this statement, here at the bottom?

A Yes, after she changed some of it.

Q Okay. We will get to that in a second.

Is this your signature? Well, you put an X here, indicating your signature at the bottom of the second page?

A No.

Q And then you indicated that you refused to sign the rest after the first page because you wanted a lawyer?

A She had wrote some stuff I didn't like. So, I just said I wasn't going to sign nothing.

Q So, what had she written that you didn't like, Mr. Harvey?

A I can't remember exact words, but it was just something that wasn't pertaining to what happened.

Q Okay. But, the first page definitely is right; right? And you signed the bottom of that?

A Yes, the one that I signed.

Q Okay. And, she gave you the chance to read that before you signed the first page, correct?

A Yes.

Q Okay. So, if anything was wrong at that point, you could have corrected it or decided not to sign it?

A Yes.

Q Do you remember being asked the question, "Where were you -- or excuse me -- were you there on June 11, 1986 at 2:30 a.m.?"

And your response was, "I don't know the date?"

A Yes.

Q You didn't tell her at that point that you had been there at nine o'clock in the morning -- at nine o'clock at night instead of 2:30, did you?

A No, I didn't.

Q And, do you remember being asked the question, "What hapened the day you were there," and you gave the answer, "I went with her sister and we were smoking coke and got high, me and her -- me and her were supposed to do something but I had spent all my money."

"Her sister left and she started getting all crazy and stuff, pushing on me to get out. I told her to give me my money, that money I spent on her doing coke." Do you remember telling Investigator Wilkinson that?

A Could you say that again?

Q Okay. Do you remember telling Investigator Wilkinson, "I went with her sister and was smoking coke and got high. Me and her were supposed to do something but I had spent all of my money. Her sister left and she started getting all crazy and stuff,

pushing on me to get out. I told her to give me my money back, money that I had spent on her for the coke."

Do you remember telling Investigator Wilinson that?

A Not those exact words.

Q You do remember signing the back of that?

A Yes.

Q Okay. When you say, "Not the exact words," though, that was the gist of what you told her that day?

A Something of that sort.

Q This was on July 2 which would have been about three weeks after the incident allegedly happened, correct?

A Yes.

Q At that time, you were telling Investigator Wilkinson as much as you could because you felt you were being set up or you were being unjustly accused, correct?

A Yes.

Q And you wanted to give the Officer as much information as possible so she would know you were not guilty?

A Yes.

Q And you didn't mention to her at that time that you and the sister left the house ever to get any more crack, did you.

A Yes, I did.

Q And, okay. And you -- did you mention to her that there was this other person involved, this other Black male?

A Yes.

Q And, all right. But, you still signed this, eventhough she didn't include that information?

A That was on the paper that everything I said was on the paper that I signed.

Q So, this isn't your signature, is that what you are saying?

A Yes, that is my signature.

Q Then this is the paper, isn't it?

A Could I see that?

(Document presented to the witness.)

A (Continued): Yes, that's my signature.

Q Okay. So, you didn't tell her about this other person and you didn't tell her that you had left the house with the sister to go buy more crack, isn't that correct?

A Yes, I told her that.

Q She just didn't write it down?

A Probably so.

Q And, you signed it anyway?

A Yes.

Q Now, okay. How long -- how many times would you say you had seen Ms. Sharp before this incident allegedly happened?

A I wouldn't know the number, but it was a few times. I seen her a lot of times.

Q And, so the night that this incident happened, at supposedly nine o'clock, you probably saw her out on the porch and you said something like, "Hey, Audrey, how is it going? I got some coke. You want to do some with me?"

A Yes.

Q And you knew her name at that point, correct?

A Yes.

Q Do you remember being asked by Investigator Wilkinson on July 2nd, "Do you know Audrey Sharp?"

And, you gave the answer, "No, I might know her face but not her name."

A No.

Q You don't remember her saying that?

A Uh-uh.

Q So even though that's on the first page, you signed off on that, even though that's not true?

A Yes.

Q Okay. How much would you say was the value of the crack that you had when you came to the house that night?

A How much would I say was the value?

Q How much crack did you have, how much worth?

A I had about -- when I first got there, I had about $30 worth.

Q About $30 worth?

A Yes.

Q You gave a statement in this matter last week, too, didn't you?

A Yes.

Q And that was to a different woman, correct?

A Yes.

Q And you gave her that statement because, again, you wanted to give her as much information as you could because you feel you are not guilty of this crime, correct?

A Yes.

Q That statement -- I am going to hand this to you.

MR. WELTON: Your Honor, before we get into that statement, it might be some preliminary matters we might have to talk about regarding that second statement.

MS. HICKEY: Why? Your Honor, I will stipulate it was not subject to proper Miranda and, therefore, I could not have used it in my case in chief.

I talked to the woman that took the statement and my indication is that defendant indicated that he wanted to give a statement but he

didn't know if he should talk to his lawyer. She told him he didn't need to talk to his lawyer, his lawyer was going to get a copy of the statement anyway.

That's why I did not choose to use it in my case in chief. And, I did advise Counsel of that.

There is no indication that it was involuntary and under Harris vs. New York, I may, therefore, use it to impeach, even if improper Miranda is existing in this case.

THE COURT: Do you have objections?

MR. WELTON: Yes, I do have objections, if she is going to use it, as long as she is going to use it not for substantive evidence. If she is going to use it for the proper purpose, well, I want to know how she is going to use it for the proper purpose.

MS. HICKEY: I am only using it for impeachment.

THE COURT: You may proceed in that fashion.

MS. HICKEY: Thank you.

Q (By Ms. Hickey, continuing): I am going to hand you this and ask you if this looks familiar to you?

A Yes.

Q Is that the statement that you gave last week on September 9?

A Yes.

Q That was only six days ago, correct?

A Uh-hum, yes.

Q And, did you sign each of those pages somewhere, each of the four pages on that?

A Yes.

Q Did you do that after you read it?

A Yes.

Q And, had any opportunity to make any changes that you wanted to make?

A Yes.

Q Okay. Do you remember being asked the question -- the question originally, "Why did you go there?"

"To smoke some cocaine with her," was your answer.

"Question: Who had the cocaine?"

"Answer: I did."

"Question: How much did you have?"

"Answer: $80 or more."

Do you remember giving that answer?

A Yes.

Q Now, how much did you go out and buy?

A About $50 worth.

Q Okay. What is the sister's name, do you know?

A No.

Q But you had met her several times in the past?

A Yes, I met her a few times.

Q And what was this other male's name that came back with you?

A I don't know his name either. He didn't come back with me.

Q Okay. When -- he was already at the house when you got back, was your testimony?

A Yes.

Q How long would you say you were gone to this crack house?

A Five or ten minutes.

Q And, to your knowledge, what, did he drive over there? Was there another car in front of the house or something that hadn't been there when you got back?

A When I got back there he was there.

Q When you got there the first time, he was there?

A No, the second time when we came back, me and the other lady.

Q You don't have any idea what his name is?

A No.

Q Do you remember telling the Officer last week that you think his name is Michael?

A Yes, that's what I thought his name was.

Q Where have you seen him before?

A I seen him hanging around in the neighborhood.

Q Now, it's your testimony that you had -- that she cut you with the barbecue fork and bit you on the hand?

A Yes.

Q Did you get any medical treatment for those injuries?

A No, because it was just a scratch and a little bruise.

Q So, she didn't bite you that hard?

A It bit -- it was pretty hard but nothing, really. I didn't go to the doctor or nothing for it.

Q Earlier in your direct testimony you said that he -- this other person you think might be Michael, came for his sister (sic)?

A No, I didn't.

Q You said something about "his sister"?

A I said her sister -- he came and he left with her sister.

Q He was already there when you got there and then he left with her sister after you smoked the rest of this crack?

A Yes.

Q Are you in the habit of just sharing your $80 worth of crack with anybody?

A No.

Q So, but in this case you shared it with a man you had never met, whose name you don't know, a woman that turns out not to have been the victim's sister and the victim and she was the only one that was going to give you anything for it?

A He had some caine, too, and he was smoking his. So we were like exchanging.

Q Well, why did you give it to her sister then? I don't understand?

A Because she had drove me over there to get it. So, you know, I just give her a little something to smoke, too.

Q You didn't tell the investigator last week that he had bought his own cocaine, did you?

A Did I tell the investigator last week? Yes, I told him.

Q You did?

A Yes.

Q So, if it's not in the statement, they just left it out?

A Yes.

Q But you did read it before you signed it?

A Yes.

Q Where did you go to get more crack?

A Couple blocks.

Q Where to?

A Mecca.

Q And what?

A Schaefer.

Q Is that house still there?

A No, it's burned down.

Q When did it get burned down?

A Few days after this incident.

Q Did you -- so you spent $80 on crack that night?

A Yes.

Q Your own money. How do you make your money for buying your crack?

A My uncle, he do landscaping. I either help him or just do some odd things around the neighborhood.

Q Did you tell the police Officer, Investigator Wilkinson that when she asked you if you were employed when you gave your first statement?

A No, I didn't

Q Okay. So, all right. How often do you do that much crack?

A Every now and then, I guess.

Q I'm sorry. I can't hear you.

A That's the most I had done with Audrey. Sometimes I get a twenty, every now and then.

Q So, it only takes you about, well, it took the four of you eventually, under an hour and a half to do $80 worth of crack?

A Yes.

Q What do you like when you have been smoking cocaine? What happens to you?

A I just get high.

Q Well, it's obviously not the only reaction because you said it makes you impotent, at least it did on this occasion. What else happens to you?

A Nothing else.

Q No emotional changes at all?

A Not that I know of.

Q If you were that high that night, how do you know that what you are telling us you really remember that well?

A I was high but I remember.

Q You know what I don't understand, maybe you can help me out. Why would Ms. Sharp make this whole story up about you?

MR. WELTON: Objection, your Honor.

MS HICKEY: If he knows.

THE COURT: If you know. The objection is overruled.

THE WITNESS: I wouldn't know.

Q (By Ms. Hickey, continuing): You ever had any problems with her in the past?

A No.

Q Any bad blood?

A No.

Q No problems with her sister?

A No.

Q The biting that took place between the two of you, that happened before or after she had pulled down her pants?

A Before.

Q Okay. So, it's your testimony that you guys were there busy biting each other and she just goes out in the living room disrobes and lays down on the couch?

A No. It happened in sort of that way.

Q Well, okay. What sort of didn't happen that way? You said it happened sort of that way.

A Yes, all right. After the biting incident, I got the fork from her. She went to the living room and I came in there.

So, then I told her I still wasn't leaving until I got paid.

Q you got the fork from her?

A Yes, I pulled it out.

Q Did you get it away from her?

A Yes, I pulled it.

Q You followed her into the living room with the fork?

A No.

Q What did you do with it?

A I threw it on the floor.

Q Did you mention that to either of the Officers you talked to?

A Not that I know of.

Q Didn't you think that was kind of an important point?

A Not -- didn't nobody ask me that question. i would have answered it.

Q Okay, I just wanted to make sure I am right about this. Looking at your second statement, the one you say is accurate, isn't it true that this statement, there's a question that's on the -- the last question on the first page. Your answer begins on the bottom of the first page and it's one long continuous paragraph, almost all the way through the second page?

A Yes.

Q And that was just you telling your story about what happened, right?

A Uh-hum.

Q So, you got the fork away. You bit her on the back; she has bitten you on the hand?

A Yes.

Q You get the fork away from her and you just dropped it on the floor?

A No. When I like -- when I was pulling it from her, it just went like that.

Q And, were you in the kitchen or in the living room then?

A The kitchen.

Q So, then she's not armed and you are not armed?

A Yes.

Q How many times did you hit her at that point?

A I didn't hit her then. Oh, before that"

Q Yes. Well, before you pulled the fork out of her hand?

A I would say once, probably twice.

Q And both times in the face?

A Yes.

Q How many times did you hit her in the side?

A I didn't hit her in her side.

Q Okay. So, you punched her in the face probably once or twice; she doesn't have any weapon, and you don't have any weapon. And then you have bitten her in the back and she's bitten you in the hand. And then she just walked into the living room and lays down and decides to have sex with you?

A No, she ran into the living room. I came in behind her. She had told me to leave and I told her I wasn't leaving until I got paid. And then she just took her pants off.

Q Okay. So, you are both in the living room, both of your pants are down, and she tries to help you get an erection and it doesn't work?

A Yes.

Q And then, she starts screaming?

A She got all mad and told me, "Why don't I just leave."

Q And you didn't want to leave right away?

A Yes.

Q So, why did you suddenly decide to leave? I mean, if you weren't going to be able to do anything --

A Because then she started screaming for that dude and just went berserk or something. So I just said, "Forget it, I will just leave."

Q But now you said she still had the fork in her hand when she let you out of the house?

A No, I didn't.

Q Okay. I misunderstood you. She just then got up and got her keys and went and let you out of the house?

A Yes.

Q Do you remember telling -- strike that.

She did say that there was a man upstairs?

A Yes.

Q And she said something about, you think you remember the name "Johnny"?

A Yes.

Q Do you remember how long after you first got there that she said anything like that, referred to this other person in the house?

A Not until that incident. Not until after she started call him.

Q Okay. Where have you seen this Michael person before?

A Seen him hanging around in the neighborhood.

Q How long - how recently had you seen him before this incident happened?

A All right, he be hanging right by the crack house. He be up there everyday.

Q Is that the crack house that burned down?

A Yes.

Q Where did he hang out after that? It burned down a couple days after the incident?

A Yes, I seen him one night, when I went over there it was burned down. He was standing by the brick wall.

Q Okay. So, how many weeks after the incident would you say it was that you saw him last?

A About one week I seen him up at the store, seen him up at the store.

Q Okay. And, when was it that you knew that there was a warrant out for you, for this crime or that the police wanted to talk to you about this crime?

A I didn't until they came and got me.

MS. HICKEY: I have nothing further.

REDIRECT EXAMINATION

BY MR. WELTON:

Q Everything that you testified to today, Mr. Harvey, did you relate that to the police officers while you were being interrogated?

A What you talking about, last week on the 9th"?

Q Well, you have been interviewed at least twice, isn't that true?

A Yes.

Q You made at least two statements. One statement you signed only the first page because you didn't agree with some of the facts on some of the other pages?

A Yes.

Q And it was another occasion, not -- well, recently, is that correct?

A Yes.

Q How long ago was that?

A That was last week on the 9th, Tuesday.

Q Now, between the two of those statements that you gave the police, was that the investigator sitting here that you gave both times?

A No, just the first time.

Q The first time?

A Yes.

Q Do you know who it was the second time you talked to?

A I don't remember the name but I remember her face.

Q It was a female?

A Yes.

Q All right. Between the two of those statements, what you did sign, you testified to that today, is that correct?

A Yes.

Q There are some things that are not in those statements, that you have also testified to today, isn't that true?

A Everything in the second statement -- but the first statement. I just didn't tell the whole story.

Q But everything in the second statement, that you testified to today is what you told the officer?

A Yes.

Q At that time?

A The second officer.

Q The second officer. Now, did your story differ in any way from what you told the officer the second time than what you testified to today in Court? Other than some facts that are not in here?

A No.

Q Did it differ any from the first statement?

MS. HICKEY: Your Honor, I think I am going to have to object --

THE WITNESS: Sort of.

MS. HICKEY: -- I think, at least the way the question is phrased, that's a question for you to decide, whether it's different at all. He can't -- that's a question ultimately for the Trier of Fact.

THE COURT: All right. The objection is sustained.

MS. HICKEY: Thank you.

Q (By Mr. Welton, continuing): Anything you have said so far in this courtroom or that you have given in terms of statements to the police, has any of that been untrue?

A Not as I can recall.

MR. WELTON: No further questions.

MS. HICKEY: No recross.

88-512 (4)

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1988

THE STATE OF MICHIGAN
Petitioner,

vs.

TYRIS LEMONT HARVEY
Respondent.

ON WRIT OF CERTIORARI
TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR PETITIONER

WAYNE COUNTY PROSECUTOR'S OFFICE

TIMOTHY A. BAUGHMAN*
Chief of the Criminal Division
Research, Training and Appeals
12th Floor, 1441 St. Antoine
Detroit, Michigan 48226
Phone: (313) 224-5792

* Counsel of Record

96 pp

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

Other Authorities

STATEMENT OF THE QUESTION

MAY A DEFENDANT BE IMPEACHED WITH A STATEMENT TAKEN SUBSEQUENT TO HIS ASSERTION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL AS CONSTRUED BY MASSIAH V UNITED STATES AND MICHIGAN V JACKSON?

OPINIONS BELOW

The opinion of the Michigan Court of Appeals is unreported and appended as Appendix A in the Petition for Certiorari. The order of the Michigan Supreme Court denying leave to appeal is appended as Appendix B in the Petition for Certiorari.

STATEMENT OF JURISDICTION

The judgment of the Michigan Court of Appeals was entered on May 18, 1988. The order of the Michigan Supreme Court was entered on August 24, 1988. The jurisdiction of this Court is invoked under 28 USC 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

The Sixth Amendment provides, in pertinent part, that in all criminal

prosecutions the accused shall have the right to "the assistance of counsel in his defense."

The Fourteenth Amendment provides, in pertinent part, that no person shall be deprived of liberty without "due process of law."

STATEMENT OF THE CASE

The victim in this case, Audrey Sharp, testified that on June 11, 1986 respondent rang her doorbell at about 2:30 in the morning (R, 12). Respondent had been to Ms. Sharp's house twice previously, and she had seen him in the neighborhood. She knew him only as "T" (R,10-11). Respondent asked to use the telephone, and was admitted by Ms. Sharp. He went to the telephone, and Ms. Sharp sat at the kitchen table (R, 12-13). Respondent then approached Ms. Sharp from behind with a barbecue fork in hand (R,13). Respondent demanded that Ms. Sharp get up from the table. As she complied, she grabbed respondent's hand (R,16). The two struggled down the basement steps to the landing, where respondent placed his hand over Ms. Sharp's mouth and said "Shut up,

bitch, shut up." Ms. Sharp was yelling for "Johnny," her ex-husband, who was not actually at home, to make respondent believe someone was in the home (R,17-18). Ms. Sharp then bit respondent's hand, and respondent bit her in the back.

As the struggle continued respondent picked up some garden shears from the landing. The two struggled back up the stairs into the kitchen. Respondent "flipped" Ms. Sharp and then punched her in the face (R,18). Respondent then pursued Ms. Sharp to the living room, where he made her take off her clothes (R,24). Respondent still had the barbecue fork and garden shears in his hand. He then committed an act of cunnilingus upon Ms. Sharp (R,25-26), and forced intercourse on her (R,26). As he left, respondent told Ms. Sharp that "If you tell anyone or

anyone comes after me, I will be back...." (R,27).

Ms. Sharp did not report the crime until two days later, testifying that she was afraid of respondent (T, 28-29). She was later treated at the hospital for facial injuries from the punches to the face (R, 31). She had suffered three fractures of the left eye socket (R,75). Ms. Sharp admitted that she used crack cocaine once or twice a week, but stated she had not used crack that day, nor had she ever "done" crack with respondent. She also testified that respondent had never offered to buy cocaine for her in exchange for sex, and was not at the house at 9:00 p.m. (R,32-33).

On cross examination Ms. Sharp denied that she had agreed to exchange sexual favors for cocaine from respondent, that

she had ever had sex with respondent previously, or that she had ever gotten high with respondent (R, 72).

Respondent testified that about 9 p.m. on the evening in question he was passing by Ms. Sharp's house, saw her on her porch, and went to talk with her (R,97). He asked her if she wished to smoke some "caine," she responded yes, and the two of them went into the house. As they smoked he asked if she wished to "turn some favors" and she said yes. Ms. Sharp's sister then arrived, according to respondent, and also wanted some cocaine, so respondent left with the sister to get more cocaine (R,98-99). When he returned another male was present, and they all smoked cocaine, but eventually the other male and the sister left. Respondent then requested Ms. Sharp to "turn that favor," and she refused and told him to

leave. He stated he would not leave until he got money or some cocaine "or something" (R,99).

Respondent testified that Ms. Sharp then attacked him with a barbecue fork, and he struck her in the eye. A struggle followed, including mutual biting (R,99-100). At this point, according to respondent, Ms. Sharp "just took off her pants and got on the couch." She then attempted to assist him to perform intercourse, but he was unable to perform (R,100). She became angry and ordered him out, resulting in a further struggle, in which respondent again punched Ms. Sharp (R, 100). Finally he left (R,100).

Respondent also testified that he had "gotten high" on prior occasions with Ms. Sharp, and that he was out of the house by approximately 10:30 p.m. (R,101-102).

On cross examination the assistant prosecuting attorney confronted respondent with a statement he made to the police on July 2, 1986. Respondent testified that he had signed only the first page of the statement, and not the other pages, because "she (the officer) wrote some stuff I didn't like" (R,111). The prosecutor asked "Do you remember being asked the question 'were you there on June 11, 1986 at 2:30 am?' and responding 'I don't know the date'?" Respondent answered "yes," and the prosecutor then asked "You didn't tell her at that point that you had been there at nine o'clock in the morning -- at nine o'clock at night instead of 2:30, did you?" and respondent answered that he had not (R,112). Further questions regarding inconsistencies between the statement and respondent's trial testimony were asked (R,113-114).

The prosecutor then asked respondent "You gave a statement in this matter last week, too, didn't you?" Respondent answered that he had. The prosecutor asked "And you gave her (the officer) that statement because, again, you wanted to give her as much information as you could because you feel you are not guilty of this crime, correct?" to which respondent answered "yes." (R,116). At that point the prosecutor began to question respondent regarding that statement. The Michigan Court of Appeals opinion states:

> "Defendant was arraigned on July 2, 1986, and counsel was appointed. On September 9, 1986[1], six days before trial,

---

1. Court orders reveal that the trial judge had ordered, on defense request, that defendant be given a polygraph examination, and that a writ of habeas (con't)

defendant told another police officer that he wanted to make another statement, but he didn't know if he should talk to his lawyer. The officer told him that he didn't need to talk to his lawyer because his lawyer was going to get a copy of the statement anyway. Defendant then signed a constitutional rights waiver form. Defendant initialed the following rights:

---

1. (cont'd) corpus for this purpose was issued on September 8, 1986, and executed September 9, 1986. Thus, it appears that the polygraph occurred on the same date as did the interview in question. Michigan has a peculiar statute which mandates a polygraph upon request in criminal sexual conduct cases, though the results are inadmissible for any purpose at trial, solely as an aid to the prosecutor in his charging/prosecution decisions, though there is no requirement that the prosecution give any consideration whatever to the results. See MCL 776.21(5).

1)I have the right to remain silent and I do not have to answer any questions put to me or make any statements; 2)I have the right to have an attorney (lawyer) present before and during the time I answer any questions or make any statements; and 3)if I cannot afford an attorney (lawyer), one will be appointed for me without cost by the court prior to any questioning. Defendant did not initial the following rights: 1)any statement I make or anything I say will be used against me in a Court of Law and 2)I can decide at any time to exercise my rights and not answer any questions or make any statement. When asked if he understood his constitutional rights, defendant responded: "Yes." Defendant then gave a detailed statement different from

his first statement, but essentially similar to his trial testimony."

"When the prosecutor attempted to impeach defendant with the second statement, defense counsel objected. The prosecutor conceded that the second statement could not be used in her case in chief because it was taken in violation of defendant's Miranda rights; however, she argued that she could use it for impeachment purposes because it did not appear to be involuntary, citing Harris v New York....Defense counsel had no objection to the prosecutor using the second statement for impeachment purposes....The prosecutor used the statement to impeach defendant by pointing out that defendant had failed to include some of his trial testimony

in the second statement even though it was only given six days earlier" (Opinion of the Michigan Court of Appeals, Petition for Certiorari, 3a-5a).

Respondent testified that the statement was his, that he signed it after he read it, that he had the opportunity to make any changes that he wished to, and that everything he had said in his statements and in his testimony had been the truth (R, 118, 131). He also was asked by his counsel on redirect "Now, did your story differ in any way from what you told the officer the second time than what you testified to today in Court? Other than some facts that are not in here?" Respondent answered "No."

The prosecutor gave a closing argument arguing the issue of credibility, and noting the differences between defendant's statements and his trial testimony (R,134). The case was tried to the court, and the trial judge convicted, finding Ms. Sharp to be credible (R,146-149). Respondent received a sentence of 6-10 years.

On appeal the Michigan Court of Appeals reversed, holding that "If defendant's second statement was made only in violation of his Fifth Amendment Miranda rights, we would hold likewise (that impeachment was appropriate); however, this statement was also made in violation of defendant's Sixth Amendment right to counsel. See e.g. Michigan v Jackson....A statement so acquired may not be used for any purpose, including impeachment ....Because this case involved a

credibility contest between defendant and the victim, we cannot say that the error was harmless beyond a reasonable doubt."

The Michigan Supreme Court denied leave, three justices dissenting. This Court then granted the Petition for Certiorari.

SUMMARY OF ARGUMENT

The issue presented by this case is whether, consistent with the Constitution, a statement taken from an accused in violation of his Sixth Amendment right to counsel as construed by Massiah v United States and Michigan v Jackson may be used by the prosecution to impeach the testimony of the accused when he or she testifies at trial. The Michigan Court of Appeals answered this question in the negative in this case. Petitioner disagrees.

First, in order to assess the appropriateness of attachment of an exclusionary remedy extending even to impeachment use of the statement, it is necessary to consider the nature of the constitutional violation which has occurred. Petitioner submits that Massiah is itself on less than firm constitutional

footing, so that at the very least this Court should extend it no further. Because, then, it is questionable whether the constitution has been violated at all, impeachment use of the statement should be permitted.

Second, this Court has permitted impeachment with evidence seized in violation of the Fourth Amendment, and with statements taken in violation of Miranda, including statements taken after invocation of the Miranda counsel right. The only circumstance where impeachment has been disallowed is where the statement was involuntary, because the Fifth Amendment is concerned precisely with testimonial evidence. Petitioner submits that the instant case falls within the rationale of this Court's cases in the Fourth Amendment and Miranda context, so that impeachment should be permitted.

ARGUMENT

THIS COURT SHOULD HOLD THAT A DEFENDANT MAY BE IMPEACHED WITH A STATEMENT TAKEN SUBSEQUENT TO HIS ASSERTION OF HIS SIXTH AMENDMENT RIGHT TO COUNSEL AS CONSTRUED BY MASSIAH V UNITED STATES AND MICHIGAN V JACKSON.

The question involved in this case is whether, assuming (or given) that a statement was obtained from the criminal accused in violation of the Sixth Amendment right to counsel as construed in Massiah v United States, 377 US 201 (1964) and Michigan v Jackson, 475 US 625 (1986), that statement should be admissible for impeachment purposes at trial. In discussing the appropriateness of extending an exclusionary remedy to cover impeachment, however, it becomes necessary to discuss the nature of the violation which has occurred itself, and, to a degree at least, the constitutional pedigree of those cases which hold that police conduct

such as that in the instant case violates the Sixth Amendment. It will be argued in Part A, below, that Massiah "is the decision in which Sixth Amendment protections have been extended to their outermost point," Henry v United States, 447 US 264, at 282 (1980) (Justice Blackmun, dissenting), so that, at a minimum, the Court should decline to "expand them more." Maine v Moulton, 474 US 159, 190 (1985) (Chief Justice Burger, dissenting). In Part B the question of impeachment use of "illegally" obtained evidence will be discussed more directly.

A. From Massiah to Jackson

> Equality between contestants makes for good sports, but in a criminal investigation we should be seeking truth rather than entertainment.[1]

1. Grano, Selling the Idea to Tell the Truth: The Professional Interrogator and Modern Confessions Law, 84 Mich L Rev 662, 677 (1986).

The Cases

Sixth Amendment right to counsel law as it relates to the law of confessions and admissions begins with Massiah. After arraignment Massiah discussed his case with his accomplice, Colson, in Colson's automobile, not knowing that Colson was cooperating with authorities and that the conversation was being overheard electronically. Stating that its view "no more than reflect(ed) a constitutional principle established as long ago as Powell v Alabama," the majority of the Court found that Massiah was entitled to the assistance of counsel during this "secret interrogation" sponsored by the police because he had been arraigned, and the Sixth Amendment right to counsel had thus attached. Quoting from Powell v Alabama, 287 US 45 (1932) the Court buttressed its

conclusion by observing that "during perhaps the most critical period of the proceedings...that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thoroughgoing investigation and preparation (are) vitally important, the defendants...(are)as much entitled to such aid (of counsel) during that period as at the trial itself." 377 US at 205.

Justice White, joined by Justices Clark and Harlan, dissented. Justice White noted that "It is...a rather portentous occasion when a constitutional rule is established barring the use of evidence which is relevant, reliable and highly probative of the issue which the trial court has before it--whether the accused committed the act with which he is charged." 377 US at 208. On the merits of the Sixth Amendment counsel rule which the

Court had established, he stated that "Massiah was not prevented from consulting with counsel as often as he wished. No meetings with counsel were disturbed or spied upon. Preparation for trial was in no way obstructed. It is only a sterile syllogism--an unsound one, besides--to say that because Massiah had a right to counsel's aid before and during the trial, his out-of-court conversations and admissions must be excluded if obtained without counsel's consent or presence." 377 US at 209. It was the conclusion of the dissenting Justices that voluntariness should be the rule for admission of confessions, which "is a wiser rule than the automatic rule announced by the court, which requires courts and juries to disregard voluntary admissions which they might well find to be the best possible evidence in discharging their

responsibility for ascertaining truth." 377 US at 213.

Given the Court's reliance on Powell, a review of that case is in order. Powell involved, of course, the infamous "Scottsboro boys" case, where six black defendants, accused of the rape of two white females, were divided into three groups for trial, each trial was conducted in a single day, and all defendants were convicted and sentenced to death. No lawyer had been designated to represent them until the very morning of trial. It was in this context that this Court held that during the period of time between arraignment and trial the defendants were "as much entitled " to the aid of counsel as during the trial itself, concluding that "the failure of the trial court to give them reasonable time and opportunity to secure counsel was a clear denial of due

process" (emphasis added). 287 US at 71. That which occurred in Massiah and that which occurred in the instant case cannot reasonably be said to be akin to that which occurred in Powell--neither Massiah nor respondent were denied a reasonable time and opportunity to obtain counsel; indeed, both had counsel, in respondent's case, appointed counsel, to assist them at every step of the proceedings, including the planning of strategy. If the Sixth Amendment truly precludes police discussions with a criminal accused after the institution of formal judicial proceedings, some stronger basis than Powell is required to justify it.

Perhaps the most "notorious"[2] of Massiah's progeny is Brewer v Williams, 430

---

2. Uviller, Evidence From the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint, 87 Columbia L Rev 1137 (1987)

US 387 (1977), often known as the "good Christian burial speech" case. Williams had been arrested for the kidnapping of a young girl, whose whereabouts had not yet been determined. He was repeatedly "Mirandized," arraigned, and consulted with two lawyers. He was to be driven by the police from the city of his arrest to the city where the kidnapping had occurred, and his lawyer was not allowed to accompany him during the trip. There was also a claim that before the trip the police detective had promised not to interrogate Williams during the trip. As they traveled the detective, who believed the victim to be dead, gave the "good Christian burial speech." He talked about the desire of the parents to have a Christian burial for their daughter, noted that it was Christmas Eve, referred to the fact that the weather conditions might soon make it impossible

for the body to be found, and concluded by telling Williams not to answer but to "think about it." After a period of time Williams told the police he would take them to the body, and did so.

Because Williams had been arraigned in the city of his arrest, the case was treated as a Sixth Amendment case rather than a Fifth Amendment case. Interestingly, had the police simply deferred arraignment to the city where the crime occurred, the Sixth Amendment would have had no application. As Professor Grano has stated, "To many observers this line drawing analysis demonstrates the merit of the claim that Justice Stewart's sixth amendment jurisprudence exalts form over substance." Grano, Rhode Island v Innis: A Need To Reconsider The Constitutional Premises Underlying The Law

Of Confessions, 17 Am Cr L Rev 1,9 (1979). But given Massiah, the issue was not whether Williams had a right to counsel, but whether he had appropriately waived it, and it was this issue which split the Court five to four, the majority finding that waiver had not been demonstrated. In dissent again, Justice White referred to the majority's reading of Massiah as creating a "right not to be asked any questions in counsel's absence rather than a right not to answer any questions in counsel's absence, and that the right not to be asked questions must be waived before the questions are asked." 430 US at 436. Justice Blackmun, also dissenting, observed that in his view an important factual predicate to Massiah was that Massiah "did not even know that he was under interrogation by a government agent." 430 US at 441, fn 3.

In his analysis of Brewer v Williams Professor Uviller has made the following observation regarding the majority opinion:

> ...the Court was not really saying that the lawyer should have been included on the long, snowy drive to Des Moines. They were saying Williams should not have been encouraged to disclose the contents of his mind at that stage. Had the lawyer been permitted to ride with them, he would not have allowed Williams to lead the police to the victim's body. Without the lawyer in the car, the police should not have enjoyed a more favorable position. One way or the other, with counsel present or without, interrogation or its equivalent is precluded after accusation. That is the decision's unmistakable thrust.

Uviller, 87 Columbia L Rev at 1162.

A trio of later "informant" cases also raise Sixth Amendment issues: United States v Henry, 447 US 264 (1980), Maine v Moulton, 474 US 159 (1985), and Kuhlmann v Wilson, 477 US 436 (1986). The first of the three, United States v Henry, involved conversations undertaken by an informant

with an indicted and jailed defendant--Henry. An FBI agent advised the informant, himself a prisoner, to be "alert to any statements made by the federal prisoners, but not to initiate any conversation with or question Henry" regarding the charged offense. 447 US at 266. Henry did make statements to the informant. The majority of the Court held that admission of testimony as to Henry's statements to the informant was a violation of Massiah, because the informant "was not a passive listener; rather, he had 'some conversations with Mr. Henry' while he was in jail and Henry's incriminating statements were 'the product of this conversation.'" 447 US at 271. Thus, because the government had "deliberately elicited information" from Henry after the attachment of the right to counsel, the evidence was inadmissible. The majority

also observed that "Although both the Government, and Mr. Justice Rehnquist in dissent, question the continuing vitality of the Massiah branch of the Sixth Amendment, we reject their invitation to reconsider it." 447 US at 269, fn 6.

Justice Blackmun, joined in dissent by Justice White, stated that "For purposes of this case, I see no need to abandon Massiah...as Mr. Justice Rehnquist does" (emphasis added). 447 US at 277, fn 1. It was his view that "Massiah certainly is the decision in which Sixth Amendment protections have been extended to their outermost point" and that the majority opinion was an expansion for which he could "not perceive any good reason." 447 US at 282.

As indicated in the majority opinion, Justice Rehnquist in dissent took the position that "Massiah constitutes such a

substantial departure from the traditional concerns that underlie the Sixth Amendment guarantee that its language, if not its actual holding should be re-examined." 447 US at 290. Justice Rehnquist concluded:

> ...there is nothing in the Sixth Amendment to suggest, nor does it follow from the general accusatory nature of our criminal scheme, that once the adversary process formally begins the government may not make any effort to obtain incriminating evidence from the accused when counsel is not present....there is no constitutional or historical support for concluding that an accused has a right to have his attorney serve as a sort of guru who must be present whenever an accused has an inclination to reveal incriminating information to anyone who acts to elicit such information at the behest of the prosecution. To the extent the accused is protected from revealing evidence that may be incriminatory, the focus must be on the Fifth Amendment privilege against compulsory self-incrimination.

447 US at 295-296.

Next came Maine v Moulton, 474 US 159 (1985). Once again an informant was employed, an accomplice of Moulton named

Colson (interestingly enough, the accomplice/informant in Massiah was named Colson). Moulton had been charged with receiving stolen property, and had obtained retained counsel. Colson informed the police that he had been threatened regarding the charges, and wished to speak further with them. As a result, Colson became a government witness in the pending prosecution, and also disclosed that Moulton had discussed a plan to kill a witness. Colson agreed to have a recording device placed on his telephone, with instructions to turn it on when he received a call, but only to leave it on if the call was a threat from the anonymous caller or a call from Moulton.

Three telephone conversations between Colson and Moulton were taped, and a meeting between the two was agreed upon, at which Colson was wired with a body

transmitter. The meeting included a lengthy discussion of the pending charges, and a discussion of the idea of eliminating witnesses, which was discussed only briefly. Statements made in the conversations on the telephone and at the meeting were admitted against Moulton.

A majority of the Court affirmed the state court's reversal, relying upon Massiah and Henry, and holding that "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and thereby dilutes the protection afforded by the right to counsel."[3] 474 US at 171. The State argued that in both Massiah and Henry the government had initiated the confrontation between the accused and the police, whereas

---

3. Professor Uviller has noted that the opinion marks the "first negative affirmative obligation in jurisprudence." Uviller, p.1163, fn 96.

in the case before the Court it was Moulton who called Colson and Moulton who arranged the face-to-face meeting. The majority found this distinction irrelevant; rather, though statements obtained after the right to counsel "by luck or happenstance" would be admissible, any "knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is the intentional creation of such an opportunity" (emphasis added). 474 US at 176. Noting the legitimate desire of the Government to investigate other crimes or threats, the Court concluded that while evidence as to the pending case must be suppressed, "to exclude evidence pertaining to charges as to which the Sixth Amendment right to counsel had not attached at the time the evidence was

obtained...would unnecessarily frustrate the public's interest in the investigation of criminal activities." 474 US at 180. Consequently, those statements could be admitted.

In a dissent joined by three other justices (Justice O'Connor joining only as to Parts I and III), Chief Justice Burger referred to the result as "bizarre." He concluded by quoting from Justice Blackmun's dissent in Henry that "Massiah certainly is the decision in which Sixth Amendment protections have been extended to their outermost point," and stating that he would "not expand them more and well beyond the limits of precedent and logic." 474 US at 190. He also expressed doubt as to the wisdom of applying the exclusionary rule, even if a finding of a Sixth Amendment violation was justified.

The final case in the "informant"

trilogy is Kuhlmann v Wilson. Wilson was charged with a murder of a taxicab dispatcher and arraigned. In his cell in jail was an inmate who was an informer, and who had been instructed by the police to start no conversations with Wilson, but to listen to anything Wilson might say about the crime. Wilson eventually told the informant that he had planned and carried out the robbery with two others, and that the dispatcher had been murdered.

Reversing the lower court, the majority of the Court (only a plurality existed as to a habeas corpus issue, but six Justices agreed upon the merits of the counsel/confession issue) applied Massiah, Henry, and Moulton to reach the conclusion that the case was the other side of the coin from Henry. Justice Powell, writing for the majority, noted that "the primary

concern of the Massiah line of decisions is secret interrogation by investigatory techniques that are the equivalent of direct police interrogation....the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed to elicit incriminating remarks." 477 US at 459. The dissenting Justices disagreed, principally on the ground that in their view the state "intentionally created a situation in which it was foreseeable that respondent would make incriminating statements without the assistance of counsel." 477 US at 476.

The case most directly related to the instant case is Michigan v Jackson, 475 US 625 (1986). The defendants in two cases consolidated for hearing by the Court had both been arraigned and requested counsel, and were subsequently "Mirandized" and made

incriminating statements. Taking its cue from the Fifth Amendment holding of Edwards v Arizona, 451 US 477 (1981) that a defendant who invokes his Miranda counsel right cannot thereafter be interrogated unless he initiates the conversation, the Court held that the same rule would apply when the defendant invokes his Sixth Amendment counsel right affirmatively at judicial proceedings. The dissenting Justices disagreed with this syllogistic importation of Edwards into the Sixth Amendment--1)Edwards created a bright-line rule to protect a defendant's Fifth Amendment rights; 2)Sixth Amendment rights are even more important than Fifth Amendment rights; 3)therefore, Edwards must apply to the Sixth Amendment, 475 US at 637 --observing that the basis of Edwards was to insure that statements were voluntary, whereas the Sixth Amendment serves different purposes. The dissent also noted

the peculiar situation in which the majority opinion left the law: though the Sixth Amendment right attaches at the institution of formal judicial proceedings, the Jackson Sixth Amendment right not to be approached only attaches after assertion of the right to counsel (in the cases before the Court, at arraignment). If the Sixth Amendment right attaches, but is not affirmatively asserted; for example, if the defendant at arraignment declines appointed counsel because he or she wishes to retain counsel, then the Jackson rule does not apply, the accused may be approached, and Fifth Amendment principles govern. See, specifically allowing a police interview after the attachment of the Sixth Amendment right because the defendant "at no time sought to exercise his right to have counsel present." 108 S Ct at 2394.

Analysis

> A neutral and durable principle may be a thing of beauty and a joy forever. But if it lacks connection with any value the Constitution marks as special, it is not a constitutional principle and the Court has no business imposing it.[4]

Until its relatively recent revival, Massiah was fairly regarded as an "oddball sixth amendment 'confession' case." Kamisar, Brewer v Williams, Massiah, and Miranda: What is "Interrogation"? When Does It Matter?, 67 Geo L J 1,34 (1978). This is so because, as Professor Grano has pointed out, "The sixth amendment has traditionally functioned as a sword, enabling defendant to test the truth of the prosecutor's evidence and to present his best defense." 17 Am Cr L Rev at 9. The Massiah/Williams/Jackson use of the Sixth amendment as a shield, however, which has

---

4. Ely, The Wages of Crying Wolf: A Comment On Roe v Wade, 82 Yale L J 920, 949 (1973)

as its purpose the protection of the accused from revealing legal, relevant evidence, see Grano, 17 Am Cr L Rev at 9-10, fn 59, is of far more recent creation, and is more controversial. Its constitutional validity is problematic. Professor Grano has attempted to construct a defense of the right to counsel's shield function, recognizing that if "I fail to connect the right to counsel's shield function to the sixth amendment, I am prepared to concede that Massiah and Williams should be overruled," and noting that "the shield function is not easy to defend at any stage of the process." 17 Am Cr L Rev at 18. (Professor Grano has since expressed his doubt that the "shield function" of the right to counsel "is appropriate at any stage of the process." Grano, Selling the Idea to Tell the Truth: The Professional Interrogator and Modern

Confessions Law, 84 Mich L Rev 662, 682, fn 84 (1986)).

It should first be noted that Chief Justice Rehnquist's observation in dissent in Henry that to "the extent that Massiah relies on Powell v Alabama...Massiah reads the language of Powell out of context" is clearly correct. See 447 US at 294. Powell had absolutely nothing to do with a shield function for the Sixth Amendment--no otherwise legal and relevant evidence was suppressed because of an absence of counsel at the time of its disclosure; rather, the case was instead concerned that the defendants had been deprived of the "sword" of counsel until the very day of trial, and that effective use of the sword required its provision sufficiently in advance of trial for reasonable preparation to meet the prosecution's case. The remedy in this situation is to provide counsel at an

appropriate time before trial. In contrast, in Massiah the accused had counsel sufficiently in advance of trial. The requirement of counsel imposed there was not for the purpose of assistance in preparation for trial, nor actually to achieve the presence of counsel during the conversation, but to preclude the accused from disclosing relevant information to the police. As Professor Uviller has stated, the majority in Massiah "could not have meant literally that Massiah's lawyer should have been sitting with him in Colson's car as the two erstwhile cohorts discussed their case. The idea is ludicrous....To hold that an accused defendant shall not be interrogated, or given the opportunity to speak to the police or their secret agents, except with a lawyer on hand, is simply to direct that they shall not be heard to speak their

minds, period." 87 Columbia L Rev at 1160-1161. Plainly the pretrial provision of counsel mandated by Powell was not for the purpose of denying access to the accused to the police, and the creation of a shield function for counsel out of a quotation from a precedent concerned with its sword function is unpersuasive.

Other attempts to justify a shield function for counsel founder in a sea of unprincipled line-drawing, and leave only an unspoken basis for its creation--a hostility to police interrogation. See e.g. Miranda v Arizona, 384 US 436, 537-38 (1966)(Justice White, dissenting): "The obvious underpinning of the Court's decision is a deep-seated distrust of all confessions....This is the not so subtle overtone of the opinion--that it is inherently wrong for the police to gather evidence from the accused himself."

Line-drawing is unavoidable. Counsel is to perform a shield function in the confessions context, but not before arrest, and not after arrest until the institution of formal judicial proceedings (except in terms of a Miranda warning, and this goes solely to voluntariness under the Fifth Amendment). If arraignment occurs very promptly, the shield function begins; if it does not, then the shield function does not begin, and the delay is a factor to be considered only in a Fifth Amendment voluntariness assessment. Once formal judicial proceedings have commenced, the shield function begins; however, it applies only when the police take action designed deliberately to elicit incriminating remarks, and does not apply when the police or their secret agent merely listen to the accused. Moreover, after the shield function has commenced at arraignment the

police nonetheless may approach the accused and obtain a voluntary waiver of it, unless the accused has requested counsel at the arraignment, in which case all access to the accused is denied. If, on the other hand, the accused at arraignment declines a proferred appointment of counsel, choosing perhaps to retain his own counsel, then until that event occurs the police are free to seek access to the accused, and to obtain a voluntary waiver of the Sixth Amendment shield function which, though it has attached, has not yet officially been claimed. It is suggested that the line-drawing involved in this jurisprudence is in want of a constitutional rationale --certainly it cannot be said that the defendant "needs" protection from himself more in one situation than another. And as Professor Grano has well put it, "This suggests that for those who persist in

asking why the right to counsel should not attach before adversary judicial proceedings, the appropriate constitutional response may be to ask why it should attach afterwards." Grano, 17 Am Cr L Rev at 18.

Determination of when, and under what circumstances, the shield function of the right to counsel should apply to confessions or admissions is far from the only line-drawing difficulty with the entire doctrine. If the right to counsel truly contains, as a matter of a proper construction of the Sixth Amendment, a shield function which applies to confessions under some circumstances, on what principled basis is it denied to the accused in other circumstances where counsel might act either to shield the accused from disclosure of relevant evidence or to assist him by being present at a procedure "important" to the case?

What of presentation of evidence to a grand jury? There is no right to counsel in the room during testimony. United States v Mandujano, 425 US 564 (1976). What if the police obtain and execute a search warrant, either before or after formal proceedings have begun? The suspect or accused has no right to counsel either at the issuance or the execution of the warrant. Whether before or after the institution of formal proceedings the police might request of the accused his consent to a search (with no questioning about the crime). There is no requirement that counsel be present. Further, witnesses may be interviewed by the police or prosecution, and scientific tests conducted (even on evidence obtained from the accused), all in the absence of counsel for the accused. And, as Kuhlman v Wilson demonstrates, passive auditory surveillance may be conducted in the

absence of counsel and without warning. See Uviller, 87 Columbia L Rev at 1136-1137.

If, then, a shield function for the right to counsel has been imported into the jurisprudence of confessions by the appropriation of language and rationale from a case concerned with its function as a sword, and if there is no other satisfactory justification for its existence, what then?[5] It is not necessarily the case that this Court should back up and start over, though that is certainly one viable option. But if the Massiah/Jackson line of Sixth Amendment precedent is in search of a rationale under the Constitution, at least it might be said

---

5. In his attempt to construct a possible defense for Massiah, which he later stated he doubted was possible, Professor Grano insisted that "I am unwilling to abide assertions that Massiah and Williams are right because they reach 'good' results." Grano, 17 Am Cr L Rev at 18, fn 112.

that it should be extended no further. As Professor Grano has said, "the fact that we may have to live with past mistakes hardly supports an argument that we should continue to err in our ways." Grano, Judicial Review and a Written Constitution in a Democratic Society, 28 Wayne L Rev 1, 73, fn 310 (1981). Justice Blackmun in Henry stated his view that "Massiah certainly is the decision in which Sixth Amendment protections have been extended to their outermost point" and that the majority opinion was an expansion for which he could "not perceive any good reason." Justice (now Chief Justice) Rehnquist, also in Henry, took the position that "Massiah constitutes such a substantial departure from the traditional concerns that underlie the Sixth Amendment guarantee that its language, if not its actual holding should be re-examined." In dissent in Maine v

Moulton Chief Justice Burger quoted with approval from Justice Blackmun's dissent in Henry, and insisted, as to the Massiah precedents, that he would "not expand them more and well beyond the limits of precedent and logic." Justice White dissented in Massiah itself, in Williams, and in other of the Sixth Amendment cases discussed above. Justice O'Connor has also joined dissents in a number of the Sixth Amendment/confession cases discussed above. A strong case exists, then, that at the very least the Court should restrain the Massiah/Williams/Jackson line of authority within existing bounds.

B. Impeachment Use of "Illegally" Gained Evidence

Beauty is truth, truth beauty,--that is all
Ye know on earth, and all ye need to know.
Keats, Ode On A Grecian Urn

This Court has observed that "arriving at the truth is the fundamental goal of our legal system" (emphasis added). United States v Havens, 446 US 620, 626 (1980). Regarding cross-examination as a mechanism for the discovery of truth at trial Wigmore made the celebrated statement that "it is beyond any doubt the greatest legal engine ever invented for the discovery of truth....cross-examination, not trial by jury, is the great and permanent contribution of the Anglo-American system of law to improved methods of trial procedure." 5 Wigmore, Evidence, s.1367, p.32. While overarching constitutional principles may at times prevent the introduction of relevant evidence to prove guilt, this Court has not departed from the

principle that "arriving at the truth is the fundamental goal of our legal system" by prohibiting use of that same evidence on cross-examination, save one exception --statements which are involuntary under the Fifth Amendment. Petitioner submits that this Court should continue this course.

This Court first considered the question of impeachment use of "illegally" or impermissibly obtained evidence some 35 years ago, and in a Fourth Amendment context, in Walder v United States, 347 US 62 (1954). Walder had been indicted for purchasing and possessing heroin, but the case against him was dismissed after the evidence was suppressed on the ground that it was seized pursuant to an impermissible search at Walder's home. A year and a half later, Walder was again indicted, this time for four other narcotics transactions, and

the case turned on the testimony of two addicts who claimed to have purchased narcotics from Walder at the direction of federal agents. Walder himself was the only defense witness, and thus the case was a credibility contest, turning on the relative believability of Walder as against the two addicts.

On direct examination Walder testified that he had never sold narcotics to anyone in his life, and had never possessed narcotics; further, he had never given narcotics to anyone as a gift or in any other manner, or acted as a conduit in the transfer of narcotics from one person to another. On cross-examination, Walder reiterated these denials, and, over objection, was questioned regarding the heroin seized from his home some months previously. Walder denied narcotics had been seized at that time (which directly

contradicted the affidavit the defense had filed in that case when it successfully moved to suppress the evidence). 347 US at 63-64. The Government was then allowed to present testimony from an officer who had participated in the prior search, and also testimony from the chemist who had analyzed the substance seized, to impeach Walder's claims. The jury was instructed that the testimony was permissible solely to impeach Walder's credibility. 347 US at 64.

Writing for the Court, Justice Frankfurter held that "It is one thing to say that the Government cannot make an affirmative use of evidence unlawfully obtained. It is quite another to say that the defendant can turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide himself with a shield against contradiction of his

untruths. Such an extension of the Weeks doctrine would be a perversion of the Fourth Amendment" (emphasis added). 347 US at 65. Walder's conviction was thus affirmed by the Court.

Over 25 years later this Court again considered impeachment use of evidence seized unlawfully under the Fourth Amendment. In United States v Havens, 446 US 620 (1980) Havens and a confederate (both attorneys) boarded a plane bound for Miami, Florida from Lima, Peru. In Miami cocaine was found on the confederate, who implicated Havens, who had already cleared customs. Havens was arrested, and his luggage seized and searched without a warrant. Though no narcotics were found, the material from which the container for the narcotics used by Havens' confederate was made was found in the luggage. Prior to trial, this evidence was suppressed as illegally seized.

At trial Havens' confederate testified against him, stating that Havens' had supplied the container for the drugs (an altered T-shirt with sewn in pockets). Havens testified, and on direct examination specifically denied engaging in the drug smuggling activity detailed by his confederate. On cross-examination, he stated that on direct he had said that he "had nothing to do with anything with McLeroth (the confederate) in connection with this cocaine matter." He was then asked if had anything to do with the making of the pockets on the confederate's T-shirt, whether he had on the date and time in question a T-shirt in his luggage with swatches of cloth missing from it (which matched the pocket's sewed into McLeroth's T-shirt), and, when shown the T-shirt in question, whether that T-shirt had been in his luggage. He denied all

participation or knowledge in the scheme. 446 US at 622-623. A government agent was then allowed to testify that the T-shirt with material missing was found in Havens' luggage, and the T-shirt itself was admitted, with an instruction from the Court that the evidence was to be considered only for the purpose of assessing Havens' credibility. 446 US at 623.

The Court of Appeals reversed, distinguishing Walder because the precise questions asked of Havens which formed the basis of his impeachment had been asked on cross-examination rather than direct examination. This Court found this to be a distinction without a difference. Citing Fifth Amendment cases, to be discussed subsequently, the Court held that the shield against direct use of illegally seized evidence could not be "perverted

into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." 446 US at 626. The Court also found that the deterrent function served by excluding illegally gained evidence from admission as substantive evidence was sufficient, it being only a "speculative possibility" that "also making it unavailable to the government for otherwise proper impeachment would contribute substantially in this respect." 446 US at 626.

The Court reached its conclusion that impeachment was appropriate, so long as the answers given were given to questions which were within the proper scope of cross-examination, because of the principle that "arriving at the truth is the **fundamental goal** of our legal system" (emphasis added). 446 US at 626. That

being the case, it is essential to a "proper functioning of the adversary system that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth." 446 US at 627. The proper balance, concluded the Court, between the interest of insuring appropriate police conduct, and that of insuring a fact-finding process most likely to get at the truth, was struck at disallowing direct use of illegally seized evidence and allowing impeachment use of the same evidence, whether the answers given from the accused came on direct examination or from questions within the proper scope of cross-examination. 446 US at 627-628.

Similar results have obtained in the Fifth Amendment context, with a notable exception, to be discussed subsequently. In Harris v New York, 401 US 222 (1971)

Harris was charged with selling heroin, and made statements to the police after having been given an imprecise warning of his rights under Miranda (the warning failed to advise him of his right to appointed counsel). 401 US at 223-224. On direct examination he denied making a sale to an undercover officer on a particular date, and admitted a sale on a subsequent date, but claimed the content of the glassine bag he sold was baking powder as a part of a scheme to defraud the purchaser. He was questioned with regard to statements to the police which partially contradicted his testimony, and the statement was placed in the record for appeal, though not read to the jury. The jury was instructed that the statements attributed to Harris were admissible solely for gauging his credibility. 401 US at 223-224. There had been no claim made that

the statements were involuntary. 401 US at 224.

Citing Walder, this Court upheld the impeachment of Harris. "The impeachment process here undoubtedly provided valuable aid to the jury in assessing petitioner's credibility," said the Court, "and the benefits of this process should not be lost, in our view, because of the speculative possibility that impermissible police conduct will be encouraged thereby." 401 US at 225. The Court concluded by observing that "the prosecution here did no more than utilize traditional truth-testing devices of the adversary process....The shield provided by Miranda cannot be perverted into a license to use perjury by way of a defense, free from the risk of confrontation with prior inconsistent utterances." 401 US at 225-226.

The question was revisited in Oregon v

Hass, 420 US 714 (1975). After first disposing of the contention of the Oregon Supreme Court that it was free to set a higher federal constitutional standard than that set by the United States Supreme Court, the Court turned to the issue at hand. Hass was arrested for a burglary, and given appropriate Miranda warnings. After making some statements, Hass indicated that he believed that he "was in a lot of trouble" and wanted to telephone his attorney. The officer told Hass he could telephone the attorney "as soon as we get to the office," but prior to that time Hass revealed where stolen property was located. 420 US at 715-716. It was ruled that statements made by Hass after his request for counsel, including his identification of the location of stolen property, were inadmissible.

On direct examination Hass testified

that he did not see any of the property being taken (bicycles) and did not know "where those residences were located." In rebuttal, statements made by Hass after his request for counsel were introduced, to the effect that he had pointed out the houses where the bicycles were taken, and had stated that he knew where they came from but didn't know the exact street address. 401 US at 717. The jury was instructed to consider this testimony only as it bore on Hass's credibility.

Relying heavily on Harris, this Court upheld the use of the statements for impeachment purposes--"Again, the impeaching material would provide valuable aid to the jury in assessing the defendant's credibility; again, 'the benefits of this process should not be lost,'...and again, making the deterrent-effect assumption, there is

sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief....Here, too, the shield provided by Miranda is not to be perverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances." 420 US at 722.

Speaking directly to the question of deterrence, Justice Blackmun, writing for the Court, observed that

> One might concede that when proper Miranda warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material. This speculative possibility, however, is even greater where the warnings are defective and the defect is not known to the officer. In any event, the balance was struck in Harris, and we are not disposed to change it now (emphasis added).

420 US at 723. Thus, so long as the statements obtained were trustworthy; that

is, voluntary, impeachment use would be appropriate. This holding of Hass fits precisely the situation in the instant case.

It is worth observing that both Harris and Hass involve counsel considerations, albeit in the Fifth Amendment context. In Harris the warnings failed to inform defendant of his right to appointed counsel, and his statements subsequent to those defective warnings were allowed for impeachment. In Hass appropriate warnings were given, but after a request for counsel interrogation did not cease. Impeachment with statements taken subsequent to the assertion of the Miranda counsel right were permitted by this Court. Petitioner submits that there is no principled basis by which the result in Hass can be avoided in the instant case.

Mention should also be made here of

Edwards v Arizona. Though Hass predates Edwards, its holding seems clearly to apply to statements taken in violation of Edwards, though Edwards itself is not an impeachment case. After his arrest on robbery, burglary, and murder charges Edwards was given his Miranda warnings. After some discussion regarding a "deal," Edwards stated "I want an attorney before making a deal" and all questioning ceased; however, the next day, after further warnings, questioning began again and incriminatory statements were taken. The statements were held to be voluntary. This Court, reversing the conviction, established the "bright line" rule that once an accused requests counsel during interrogation he is "not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates

further communication, exchanges or conversations with the police." 451 US 484-485. Of course, an Edwards violation is precisely what occurred in Hass. It should be clear, then, that statements taken in violation of Edwards fall within the rule of Hass allowing impeachment, and that is what courts considering the question have held.[6] See e.g. Brittingham v State, 492 A 2d 354 (1985); State v Mills, 710 P 2d 148 (Or App, 1985); State v Cody, 323 NW 2d 863 (SD, 1982); United States v Hinckley, 672 F 2d 115 (CA DC, 1982); United States ex rel Adkins v Greer, 791 F 2d 590 (CA 7, 1986), cert den 479 US 989 (1986); People v Paintman, 139 Mich App 161 (1984).

---

6. Petitioner must note puzzlement with a doctrine which prohibits the use of voluntary (though Miranda defective) statements as substantive evidence--these opinions raise grave questions of its constitutional authority vis a vis the States. The Court has on more than one occasion (con't)

(con't) recognized that the procedural safeguards of Miranda "...(are) not themselves rights protected by the Constitution" (emphasis added). Michigan v Tucker, 417 US 433 (1974). Indeed, Harris and Hass are cases where the Court has explicitly recognized that it is possible for a Miranda-defective confession to be voluntary nonetheless; that is, not compelled. The confession is thus excluded as proof of guilt in these cases because of the violation of a right not itself "protected by the Constitution" though the very right protected by the Constitution, the right not to be compelled to be a witness against oneself, has not been violated. It seems logically unavoidable that from the moment the Court recognized that not every Miranda defective confession is involuntary, it in essence recognized that Miranda was wrongly decided.

The principal Miranda error lies in the translation of the right against compulsory self-incrimination into a "right to remain silent," from which logically flows the notion that when one voluntarily consents to make a statement he is thereby waiving a constitutional right, the right to remain silent, thus bringing into play the constitutional doctrine that waivers of constitutional rights must be "knowing, voluntary, and intelligent" as articulated in Johnson v Zerbst, 304 US 458 (1938). But this constitutes a fundamental misreading of the language of the Fifth Amendment. There is no constitutionally guaranteed right "to remain silent" which is waived by a voluntary consent to speak; there is, rather, a constitutionally guaranteed right not to be compelled to speak, which can never be waived, which is simply logically incapable of waiver. If, then, when one (con't)

speaks he is not waiving a right, he is either speaking voluntarily or he is not, then the entire waiver analysis of Miranda must be seen as unsupported by the language of the Fifth Amendment, and so also that of Edwards, which requires suppression of a confession because of a failure to demonstrate that the accused waived a right which is "not itself protected by the Constitution"! What is left, then, is the only test which squarely comports with the language of the Fifth Amendment: under the totality of the circumstances, was the statement voluntarily given, or was it compelled? See Baughman, Michigan, Miranda, and Focus: Now You See It, Now You Don't, 1985 Detroit Col of L Rev 801, 812-815 (1985).

Further, not only is the waiver analysis of the Fifth Amendment inappropriate given the language of the Amendment, but once the Court recognized that not every Miranda-defective confession can be said to have been gained in violation of the Fifth Amendment (that is, coerced), it admitted that it had gone beyond its Article III power in Miranda, for if it is true in a particular case that a confession is voluntary though Miranda-defective, so as to be admissible for impeachment, then from whence comes the constitutional authority of the United States Supreme Court to order a state court to exclude from evidence a confession gained in violation of no constitutional right (it being remembered that the Miranda rights are not themselves "rights protected by the Constitution")? Certainly not from Article III of the Constitution, giving all Judicial Power "in Law and Equity, arising **under this Constitution, the Laws of the United States....**" to the federal courts (emphasis (con't)

added). See Grano, Prophylactic Rules in Criminal Procedure: A Question of Article III Legitimacy, 80 NW U L Rev 100 (1985), for a thorough discussion of the Article III questions raised when a State is compelled by decisions of the Supreme Court to suppress evidence which was gained absent any violation of the Constitution.

In any event, this Court has allowed impeachment with voluntary confessions made after defective warnings regarding the right to counsel, and after assertion of the Miranda counsel right. There is a circumstance, however, in which this Court has disallowed use of statements for impeachment purposes, and that is when rather than being Miranda-defective, the statements are involuntary. Rather than having been taken in violation of prophylactic rules, these statements have been taken in violation of the constitutional proscription of the Fifth Amendment that no person shall be compelled to be a witness against himself. For example, in Mincey v Arizona, 437 US 385 (1978) Mincey had been seriously wounded, and was hospitalized "depressed almost to the point of coma." He complained that he was in "unbearable" pain, and was connected

to tubes and breathing apparatus; moreover, he expressed his desire not to be interrogated without a lawyer, and was nonetheless interrogated for an extensive period of time. This Court found the resulting statements involuntary. This being so, due process required that they not be used "in any way against a defendant at his trial." 437 US at 401.

This Court has also made clear that the rule that confessions taken in violation of the Fifth Amendment itself may not be used for any purpose does not turn on the fact that such statements are ordinarily unreliable or untrustworthy. A situation where reliability was not a concern arose in New Jersey v Portash, 440 US 450 (1979). Portash, mayor of a city, was called before an investigative grand jury by subpoena. He stated his intention to assert his right not to be compelled to incriminate himself, and as a result was

extended "use" immunity. Because of the use immunity, Portash was required to testify under penalty of imprisonment for contempt if he refused. Subsequently, he was indicted for misconduct in office and extortion by a public official. The trial court ruled that if Portash testified in a manner materially inconsistent with his grand jury testimony, that testimony could be used for impeachment. As a result, Portash did not testify at all. 440 US 452. This Court held that ruling improper. Distinguishing Harris and Hass on the ground that in those cases there had been "no claim that the statements made to the police were coerced or involuntary," the Court held that this "recognition was central to the decisions in those cases." 440 US at 458-459. Though the statements in this situation were coerced in a different sense than those in Mincey,

nonetheless "testimony given in response to a grant of legislative immunity is the essence of coerced testimony....the information given...may be more reliable than information beaten from a helpless defendant, but it is no less compelled." 440 US at 459. Because in Portash the Court was concerned with "the constitutional privilege against compulsory self-incrimination in its most pristine form" any balancing of interests was simply "impermissible," and no use of any kind could be made of the statements. 440 US at 459.

Thus, evidence seized unlawfully under the Fourth Amendment may be used for impeachment purposes, whether the answers to be impeached come on direct or to questions asked within the proper scope of cross-examination; statements taken after improper Miranda warnings, or after an

invocation of a Miranda right, including the Miranda right to counsel, may be used for impeachment purposes; and statements taken in violation of the Fifth Amendment itself--statements which are coerced or involuntary--may not be used for any purpose. What, then, of violations of the Sixth Amendment under Massiah /Williams/Jackson?

Two federal circuit cases demonstrate the argument that statements taken in violation of the Massiah/Williams/Jackson counsel right should not be admissible for impeachment. The lead case is United States v Brown, 699 F 2d 585 (CA 2, 1983). Brown was arrested for a bank robbery. One of the robbers, identified as Brown, had allegedly vaulted a 10 to 12 foot high "bandit barrier," and then opened the door to the tellers' area. Brown testified that several days prior to the robbery, on a

challenge from his girlfriend, he had demonstrated his jumping ability by touching the top of the barrier. He denied knowing one of the other perpetrators of the crime and denied having anything to do with the robbery.

On cross-examination, Brown was questioned about a prior statement given to an FBI agent which admitted involvement in the robbery, including vaulting over the bandit-barrier. The statement was taken after Brown's indictment, and approximately an hour before his arraignment. Apparently the government had conceded the taking of the statement after indictment was without a valid waiver of counsel and thereby in violation of the Sixth Amendment rights of Brown; however, the statement was used only for impeachment. In reaching its conclusion that impeachment was improper, the court stated that Miranda warnings were

insufficient for a post-indictment /pre-arraignment waiver of the right to counsel, a holding which is now untenable in light of Patterson v Illinois, supra, which held to the contrary. The court relied primarily upon Mincey and Portash, holding, as this Court did in Portash with involuntary confessions, that where the Sixth Amendment is involved "balancing is impermissible." 699 F 2d at 590. Again, weighing heavily for the court was its belief, later proven mistaken by Patterson, that the waiver of the Sixth Amendment right to counsel after indictment is "measured by a 'higher standard' than are waivers of Fifth Amendment rights." 699 F 2d at 590.

The second case is Meadows v Kuhlman, 812 F 2d 72 (CA 2, 1987), also a Second Circuit case, reversing, on federal habeas corpus review, the reasoning in People v Meadows, 476 NYS 2d 230 (2d Dept. 1984),

though upholding the convictions on a harmless error analysis. In Meadows the defendant was arrested for gas station robberies, on a state complaint and warrant. After Miranda warnings he confessed. Subsequently he was indicted, and was represented at arraignment by retained counsel. It was held in the state court that the statements given after the complaint and warrant had issued were inadmissible as substantive proof because "the right to counsel had attached, and yet counsel was not present when the statements were made," a proposition clearly incorrect as a matter of federal constitutional law under Patterson. Because the statements were voluntary, however, the trial court ruled them admissible for impeachment purposes, and Meadows' trial denials of involvement in the crimes were impeached with the statement he gave to the police.

The convictions were upheld by the state courts, see People v Meadows, 476 N Y S 2d 230 (2d Dept 1984), and on federal habeas corpus review the district court agreed. The circuit court, however, relying on Brown, disagreed, but found the error harmless.

What of other jurisdictions? As Meadows demonstrates, New York takes a contrary view to that of the Second Circuit. Another example from New York is People v Grainger, 498 N Y S 2d 940 (A.D. 4 Dept 1986). Grainger was arrested for a market robbery, and made admissions to the police. Some months later, Grainger's girlfriend's mother reported to the police and prosecution that she was being harassed by the defendant on the telephone, and wished her calls recorded. A tape recorder was installed, but the police and prosecution failed to instruct the woman

not to solicit conversation from Grainger regarding the charged offense. During one call she interrogated Grainger regarding the crime, and he finally made admissions.

The statement was suppressed under authority of Maine v Moulton, because the prosecution and police failed in their "obligation not to act in a manner that circumvents and thereby dilutes the protection" of the Sixth Amendment. 498 N Y S 2d at 943. Citing Harris, Hass, and People v Ricco, 437 N E 2d 1097 (1982), a New York case also relied upon by the court in People v Meadows, the court stated that "It is well settled that statements obtained in violation of defendant's right to counsel, although not admissible as evidence-in-chief, may be used for impeachment purposes should defendant choose to testify...." 498 N Y S 2d at 944. Because of a procedural error in the manner

in which the impeachment occurred, the conviction was reversed, though impeachment itself was held to be proper. See also People v Maerling, 474 NE 2d 231 (NY, 1984), noting, but not following, Brown.

Impeachment was also held proper in State v Thomas, 698 S W 2d 942 (Mo App 1985). Thomas, a juvenile, was charged with felony murder. He was arrested on an unrelated matter in another state, and returned under an interstate compact. When an officer traveled to Indiana to retrieve Thomas he took a statement from him in the presence of a juvenile officer and Thomas's mother, and a portion of this statement was used at trial for impeachment. The appellate court found that the statement was voluntary; however, the court found that, though the request was ambiguous, Thomas had requested counsel after being given Miranda warnings. As a matter of

Fifth Amendment law the court found impeachment proper. Though Thomas had no counsel at the time of questioning, he also asserted that his right to counsel had nonetheless attached. The court found a determination of this question unnecessary, because it observed that impeachment had been allowed in Hass after the defendant invoked his Miranda right to counsel, and the court perceived "no reason why that principle is not applicable even if the defendant's statement was taken in violation of the Sixth Amendment....To hold otherwise would, contrary to the principle announced in those cases, permit a constitutional shield to 'be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances.'" 698 SW 2d at 949. See also People v Bacino, 354 NE 2d 641 (Ill App, 1976), also relying on Hass.

Other federal circuits than the Second Circuit have considered the question and reached contrary results from that circuit. In United States v McManaman, 606 F 2d 919 (CA 10, 1979) a government agent, wearing an electronic transmitter, engaged the defendant in conversation after the defendant had been charged, retained a lawyer, and released on bail. Citing Walder, Harris, and Hass the court stated that though "these are not cases decided in the context of conduct which was illegal under the Massiah Sixth Amendment rule....we feel that the same reasoning applies here." 606 F 2d at 925. So also in United States v Taxe, 540 F 2d 961 (CA 9, 1976).

Impeachment use of illegally seized evidence is thus allowed where evidence is illegally seized under the Fourth Amendment, and also with statements taken

in violation of Miranda, whether the violation be a failure of warnings completely, imprecise warnings (including on the right to counsel), or a continuation of interrogation after an assertion of a Miranda right (including the right to counsel). The one circumstance where impeachment is not permitted is where the statement taken was taken in violation of the Fifth Amendment right against compulsory self-incrimination, and this circumstance is different from all others because the very right involved is directly concerned with compelled testimonial evidence from the mouth of the defendant.

The Sixth Amendment, the area where courts are inconsistent, is not directly concerned with compelled testimonial evidence from the mouth of the defendant. In a context which cannot be distinguished, this Court in Hass has stated:

> One might concede that when proper Miranda warnings have been given, and the officer then continues his interrogation after the suspect asks for an attorney, the officer may be said **to have little to lose and perhaps something to gain by way of possibly uncovering impeachment material.** This speculative possibility, however, is even greater where the warnings are defective and the defect is not known to the officer. In any event, the balance was struck in Harris, and we are not disposed to change it now (emphasis added).

The trial as a truth-seeking adventure requires the admission of the evidence for impeachment purposes in this context. As well-put by Justice Blackmun in Hass: "Again, the impeaching material would provide valuable aid to the jury in assessing the defendant's credibility; again, 'the benefits of this process should not be lost,'...and again, making the deterrent-effect assumption, there is sufficient deterrence when the evidence in question is made unavailable to the prosecution in its case in chief....Here,

too, the shield provided by Miranda is not to be perverted to a license to testify inconsistently, or even perjuriously, free from the risk of confrontation with prior inconsistent utterances."

Conclusion

The respondent in the instant case, after the attachment of the right to counsel, and its exercise (the appointment of counsel), initiated a contact with the police to make a further statement. However, because of an ambiguous request for counsel which was not honored the Michigan Court of Appeals found that the subsequent statement given by the accused was taken in violation of his Sixth Amendment rights. Petitioner has sought to demonstrate that the line of cases requiring this holding stand on less than solid ground, and for this reason should not be extended. That statement was

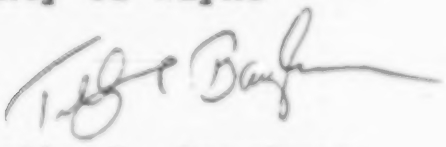
voluntary, and used only for impeachment purposes. The concerns expressed, and the balancing achieved, in Walder, Havens, Harris, and Hass, and not those of Mincey and Portash, obtain in this situation. This Court should thus hold the impeachment here was proper, and reverse the Michigan Court of Appeals.

RELIEF

WHEREFORE, petitioner requests that the Michigan Court of Appeals be reversed.

Respectfully submitted,

John D. O'Hair
Prosecuting Attorney
County of Wayne



Timothy A. Baughman
Chief of the Criminal Division
Research, Training and Appeals

COUNTER-STATEMENT OF THE QUESTION

Whether the State should be permitted to impeach a defendant with a statement obtained in violation of the Sixth Amendment.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Table of Authorities Continued

CONSTITUTIONAL PROVISIONS INVOLVED

Constitution of the United States, Amendments V, VI and XIV:

> "No person . . . shall be compelled in any criminal case to be a witness against himself. . ."
>
> In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."
>
> ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

COUNTER-STATEMENT OF THE CASE

Respondent Tyris Lemont Harvey was arraigned on charges contained in the criminal complaint on July 2, 1986. The complaint charged two counts of first degree criminal sexual conduct, which carries a penalty of any number of years up to life in prison. A $20,000.00 cash bond was set. Respondent, an indigent, was remanded to the Wayne County Jail where he remained incarcerated throughout the entire proceedings. An attorney was appointed by the court to represent respondent, and on July 10, 1986, respondent, with appointed counsel, waived his statutory right to a preliminary examination. He was bound over for trial. The personal service voucher filed by respondent's appointed attorney shows a single visit to the Wayne County Jail on July 14, 1986.

Although respondent's bond was later reduced to $20,000.00-10%, he remained in custody. Respondent waived his right to a jury trial. His non-jury trial commenced September 15, 1986.

The complainant testified that she knew respondent for three or four months before the alleged offense. (R35, 36)

She met him when a neighbor brought him to her home to borrow the pipe she uses to smoke crack cocaine. (R36, 37) The complainant smoked crack cocaine one or two times a week, but testified she did not use drugs on the day in question. (R32) The complainant testified she was sexually assaulted by respondent. (R26) She reported the incident to the police approximately two days later. (R28, 29)

Respondent testified that he went to the complainant's home about 9:00 p.m. (R97) They smoked cocaine and he later asked if she would exchange sexual favors for more cocaine. (R98, 99) He went with the complainant's sister to get more cocaine. (R99) The complainant did not provide the sexual favors, they argued, and fought. (R99, 100) Respondent denied any sexual act. (R108)

During cross-examination of the respondent, the prosecutor utilized a statement respondent made to the police on July 2, 1986 in an effort to impeach him. (R110, 112) Then the prosecutor utilized a statement apparently made by respondent to a police officer six days before trial. (R116-121) The trial record does not indicate that respondent signed a constitutional rights waiver form at the time of the second statement nor does it indicate that respondent initialed any rights on such a form. The trial prosecutor conceded a *Miranda* violation, admitting that the statement was *Miranda* deficient. (R116)

No testimony was offered concerning any of the circumstances surrounding the taking of the statement. Instead, the trial record only contains the following remarks by the trial prosecutor:

> MS. HICKEY: Why? Your honor, I will stipulate it was not subject to proper Miranda and, therefore, I could not have used it in my case in chief.

> I talked to the woman that took the statement and my indication is that Defendant indicated that he wanted to give a statement but he didn't know if he should talk to his lawyer. She told him he didn't need to talk to his lawyer, his lawyer was going to get a copy of the statement anyway.
>
> That's why I did not choose to use it in my case in chief. There is no indication that it was involuntary and under *Harris* v. *New York*, I may, therefore, use it to impeach, even if improper Miranda is existing in this case. (R116, 117)

The only impeachment concerned the dollar amount of cocaine ($30, $50 or $80) (R116-119), whether respondent remembered the name of another man who had also gone to buy cocaine, and respondent's alleged omission in the September 9, 1986 statement that the other man had purchased his own cocaine. (R119-121)

SUMMARY OF ARGUMENT

The record in this case does not affirmatively demonstrate that respondent's statement obtained in violation of the Sixth Amendment was voluntary. The issue of voluntariness was never adequately addressed or litigated below. It is unclear whether or not respondent's desire to invoke his Michigan statutory right to a polygraph examination was confused with any intention to speak with police officers conducting an interrogation six days before his trial.

The impeachment exception to the Fourth Amendment exclusionary rule should have no application to a deliberate violation of respondent's Sixth Amendment right to counsel. The Fourth Amendment and Sixth Amendment have distinct underlying purposes. Any analogy between the Fourth and Sixth Amendments is imperfect.

Sixth Amendment rights attach after formal charge and a violation of those rights impacts upon the integrity of the trial process. The "prosecutor and police have an affirmative obligation not to act in a manner that circumvents and, thereby, dilutes the protection afforded by the right to counsel." *Maine* v. *Moulton*, 474 US 159, 171 (1985). Where police interrogate a criminal defendant six days before his trial, the presence of counsel is necessary not only to advise the defendant on whether to make a statement, but also to mitigate dangers of untrustworthiness, to guarantee defendant comprehends questions propounded and ensure that his statement is fully accurate and "rightly reported by the prosecution at trial." *Miranda* v. *Arizona*, 384 US 436, 469-470 (1966).

Nor should the impeachment exception to the *Miranda* prophylactic rule, established in *Harris* v. *New York*, 401 US 222 (1970), have application to a deliberate violation of respondent's Sixth Amendment right to counsel. Where core values of either the Fifth Amendment or Sixth Amendment are implicated, then a balancing of those constitutional interests which must be protected and the truth seeking function of trial is impermissible. Petitioner's restrictive view of the role of counsel is contradicted by more than five decades of Sixth Amendment jurisprudence. Where the state deliberately violates the right to counsel, the need to preserve the right itself should render balancing impermissible.

Respondent commends a reading of *Michigan* v. *Jackson*, 475 US 625 (1986) as an application of the Sixth Amendment guarantee rather than as formulation of a prophylactic rule analogous to *Miranda* warnings. Assuming arguendo, however, that *Jackson* only establishes a prophylactic rule (a violation of which petitioner admits) the record in this case reflects a constitutional

deprivation which extends to the integrity of the trial process itself. The state should not be entitled to benefit in any fashion from wrongdoing which may impinge upon the integrity and reliability of the trial process. Any ruling otherwise would abrogate the constitutional guarantee of counsel so "essential to any fair trial of a case against a prisoner." *Powell* v. *Alabama*, 287 US 45, 70 (1932).

ARGUMENT

THE STATE SHOULD NOT BE PERMITTED TO IMPEACH A DEFENDANT WITH A STATEMENT OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT.

A. THE RECORD IN THIS CASE DOES NOT AFFIRMATIVELY DEMONSTRATE THAT RESPONDENT'S STATEMENT OBTAINED IN VIOLATION OF THE SIXTH AMENDMENT WAS VOLUNTARY.

Respondent, a nineteen year old indigent with no prior record[1] was confined in a county jail throughout the entire criminal case. A mere six (6) days before his trial he was interrogated by police officers.[2] The record does not reveal when respondent's appointed counsel learned of the pretrial interrogation or was shown the purported statement. Indeed, the police officers' deliberate and misleading comment to respondent that he didn't need his attorney may have resulted in respondent's failure to inform counsel about the interrogation because the officer also told Mr. Harvey that his lawyer was going to get a copy of the statement. (R116, 117).

---

[1] R. Sentence Hearing 3.

[2] Unlike *Harris* v. *New York*, 401 US 222 (1970), the statement itself was not placed in the record.

The trial prosecutor, during cross-examination of respondent, attempted to utilize the statement, as well as an alleged omission during the interrogation, for impeachment purposes. No testimonial record was made concerning the totality of circumstances revolving around the interrogation. Instead, there is only the characterization of the prosecutor:

> MS. HICKEY: Why? Your honor, I will stipulate it was not subject to proper Miranda and, therefore, I could not have used it in my case in chief.
>
> I talked to the woman that took the statement and my indication is that Defendant indicated that he wanted to give a statement but he didn't know if he should talk to his lawyer. She told him he didn't need to talk to his lawyer, his lawyer was going to get a copy of the statement anyway.
>
> That's why I did not choose to use it in my case in chief. And, I did advise counsel of that. There is no indication that it was involuntary and under *Harris* v. *New York*, I may, therefore, use it to impeach, even if improper Miranda is existing in this case. (R116, 117)

To be sure, the prosecutor's remarks concede no adequate *Miranda* warnings were given.[3] Those same remarks also demonstrate that the statement was taken in contravention of respondent's Sixth Amendment right to counsel.[4] Indeed, petitioner sought and gained access to this Court conceding a Sixth Amendment violation.[5]

---

[3] This concession is in conflict with the opinion of the Michigan Court of Appeals. Brief for Petitioner 10 through 12.

[4] It is also evident that there was a violation of the prophylactic rule articulated in *Edwards* v. *Arizona*, 451 US 477 (1981).

[5] See Statement of Question Presented Petition p. 1. Now, in an extended discussion of the Sixth Amendment, petitioner backs away from this concession and extends an implied invitation to find no Sixth Amendment deprivation here or to reverse more than five decades of Sixth Amendment jurisprudence.

The trial prosecutor also reiterated an alleged statement by the police officer that "Defendant indicated he wanted to give a statement". This remark, along with respondent's affirmative response to a prosecutor's question incorporating respondent's belief in his own innocence, presumably, according to petitioner, demonstrates voluntariness. Respondent suggests that, given an essentially silent trial record, this is likely an unfair and inaccurate conclusion.

As petitioner observes, respondent invoked his statutory right under Michigan law to a polygraph examination, and that test may have been given on the same day as the offending interrogation.[6] On this record, respondent's expressed desire to take a polygraph examination may be inextricably intertwined with the custodial interrogation which followed or preceded it. It is therefore unclear whether respondent's desire to take a polygraph examination was confused with or transformed into a desire to give a statement. If respondent believed that he had to speak to the police in order to obtain his statutory right to a polygraph examination, then respondent was subjected to an intolerable choice which injects an element of coercion. *Garrity* v. *New Jersey*, 385 US 493 (1967). And the prosecutor's question, as well as the respondent's answer, conceivably were adroit attempts to avoid reference to the polygraph examination itself which, under Michigan law, may have injected reversible error.[7]

---

[6] In Michigan, this procedure may implicate traditional concerns for voluntariness and trigger the necessity for "Walker hearings." (*People* v. *Walker*, 374 Mich 331; 132 NW2d 87 (1965), holding that the voluntariness of a confession must be determined on a separate record outside of the presence of the jury.) *See, e.g., People* v. *Sclafani*, 132 Mich App 268 (1984); 347 NW2d 30 (1984). *See also Henry* v. *Dees*, 658 F2d 406 (5th Cir 1981).

[7] *See, e.g., People* v. *Walker Frazier*, 24 Mich App 360; 180 NW2d 193 (1970); aff'd 385 Mich 596 (1971).

Respondent's counsel made no effort to inquire about or challenge the legality of the statement. The Michigan Court of Appeals concluded that this critical failure by appointed counsel may have been because "he apparently believed that the second statement was identical to Defendant's trial testimony."[8] In any event, the record below is almost completely barren of facts concerning the full extent of police conduct and demeanor involved in the taking of this statement. Nor does the record speak to respondent's mental condition, level of literacy, state of mind, level of intelligence or physical condition.[9]

---

[8] In *People* v. *Sclafani*, *supra*, note 6, the Michigan Court of Appeals found that defense counsel's limited familiarity with police polygraph examinations, which in that case led to defendant's confession during a pre-polygraph "interview", amounted to ineffective assistance of counsel compelling a reversal. The ABA Special Committee on Criminal Justice in a Free Society, in its 1988 report "Criminal Justice in Crisis," discussed the Sixth Amendment right to counsel finding that:

> The right to representation by counsel for criminal defendants is constitutionally mandated and essential to the administration of criminal justice. The defense lawyer, performing in accordance with professional standards, provides a necessary challenge to the prosecution and notwithstanding popularly held belief, does not cause dysfunction in the criminal justice system. Prosecutors and police appreciate the role of the defense lawyer and do not believe that these lawyers impair their ability to control crime or to prosecute cases effectively. In the case of the indigent defendant, the problem is not that the defense representation is too aggressive but that it is often inadequate. Id at 35.

The personal services voucher submitted by counsel and contained in the trial record shows a single visit with respondent at the county jail on July 14, 1986. A preliminary examination scheduled for July 10, 1986 was also waived. Moreover, the statement itself was exculpatory in nature and one might reasonably suggest that perceived inconsistencies involved peripheral or unimportant details.

[9] Both the complainant in the case and the respondent had substance abuse problems and admitted use of cocaine.

Voluntariness and an absence of impermissible coercion are an absolutely essential predicate to resolution of the issue as framed by petitioner. And this Court may not wish to "engage in this type of abstract adjudicating of constitutional rights in a factual vacuum." *New Jersey* v. *Portash*, 440 US 450 at 464 (Blackmun, J., dissenting). Regardless, petitioner's effort to extend application of the impeachment exception to the Fourth Amendment exclusionary rule or the prophylactic requirements of *Miranda* to a substantive violation of the Sixth Amendment right to counsel should fail.

B. THE IMPEACHMENT EXCEPTION TO THE FOURTH AMENDMENT EXCLUSIONARY RULE SHOULD HAVE NO APPLICATION TO THE DELIBERATE VIOLATION OF RESPONDENT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

Petitioner argues that notwithstanding deliberate violation of the Sixth Amendment right to counsel, the state should be free to make affirmative use of a wrongfully obtained statement to cross-examine a defendant.[10] There is no question that this Court has long held that physical evidence illegally seized in contravention of Fourth Amendment rights may be used in such a manner. *Walder* v. *United States*, 347 US 62 (1954); *United States* v. *Havens*, 446 US 620, 626 (1980). But the harms involved in these distinct constitutional rights are as different as the rights they are intended to secure and the important purposes underlying them. In the normal course, an illegal search is likely in the investigative stage rather

---

[10] The fact that contact with respondent may have been initiated because of respondent's request for a polygraph examination is irrelevant to the Sixth Amendment violation. *See Maine* v. *Moulton*, 474 US 159 (1985)

than after formal accusation. The harm is essentially complete at the time of the wrongdoing. The aggrieved party has other remedies. *See, e.g., Bivens* v. *Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 US 388 (1971). A Sixth Amendment violation, on the other hand, necessarily occurs after the state initiates formal proceedings and impacts upon the integrity of the trial process. Thus it has been suggested that Fourth Amendment rights are substantive rights reposed in all citizens, unlike Sixth Amendment rights which are procedural and involve the integrity of a criminal prosecution. *See* Loewy, "Police Obtained Evidence and the Constitution: Distinguishing Unconstitutionally Obtained Evidence From Unconstitutionally Used Evidence", 87 Mich. L. Rev. 907 (1989)

Formal charge by the state marks the commencement of adversarial judicial proceedings and is a constitutionally significant moment.

> The initiation of judicial criminal proceedings is far from a mere formalism. It is the starting point of our whole system of adversary criminal justice. For it is only then that the government has committed itself to prosecute, and only then that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law. It is this point, therefore, that marks the commencement of the "criminal prosecutions" to which alone the explicit guarantees of the Sixth Amendment are applicable. *Kirby* v. *Illinois* 406 US 682, 689-90 (1972) (plurality opinion) (footnote omitted).

Critical Sixth Amendment rights are thus said to "attach" to the accused and limit subsequent interaction

between the state and the accused. This Court has therefore emphasized that "the prosecutor and police have an affirmative obligation not to act in a manner that circumvents and, thereby, dilutes the protection afforded by the right to counsel." *Maine* v. *Moulton*, 474 US 159 (1985). The state is not permitted to deliberately elicit (or logically attempt to elicit) incriminating statements from a defendant represented by counsel after indictment or formal charge. *Massiah* v. *United States*, 377 US 201 (1964); *United States* v. *Henry*, 447 US 264 (1980). The right to counsel is one of several Sixth Amendment guarantees which are fundamental rights extended to the accused through the Fourteenth Amendment in a state prosecution. *Herring* v. *New York*, 422 US 853 (1975). *Massiah* binds the state through the Fourteenth Amendment. *McLeod* v. *Ohio*, 381 US 356 (1965).

When unnamed police officers interrogated respondent in secret more than two months after appointment of counsel and six days before his trial, they were not engaged in an investigative inquiry to solve a crime. Instead they served as agents of the prosecutor and were "adversaries" attempting to obtain admissions and prepare for trial. Thus, they deliberately attempted to substitute non-public interrogation for public trial with all of its procedural safeguards. The presence of counsel is absolutely necessary on such an occasion to "minimize the imbalance in the adversary system." *United States* v. *Ash*, 413 US 300, 309 (1973). An attorney's presence is necessary in this critical situation "where the accused is confronted by his expert adversary" under circumstances where "the results might well settle the accused's fate." *Id.* at 310.

Also, deliberate intrusion of respondent's right to counsel here causes a continuing harm which extends to the

trial process itself. Under the facts of this case, questions of fairness, reliability, and trustworthiness are implicated. The attempt by the trial prosecutor to impeach respondent by an alleged omission at the time of the interrogation is illustrative:

> Q. You didn't tell the investigator last week that he had bought his own cocaine, did you?
>
> A. Did I tell the investigator last week? Yes, I told him?
>
> Q. You did?
>
> A. Yes.
>
> Q. So, if it's not in the statement, they just left it out?
>
> A. Yes.
>
> R 121, 122

Here, respondent testified that he made a particular statement to the interrogating officers, while the prosecutor insinuates to the contrary. This, according to the petitioner, is a desired truth-testing device. Incongruously, however, the prosecutor in this case failed to complete the impeachment process since the officers who conducted the interrogation were never called as witnesses. But the point here is not that respondent's answer stands uncontradicted in the trial record; rather the point is that presence of counsel was necessary at the interrogation, not only to advise respondent on whether to make a statement, but also to "serve several significant subsidiary functions as well". These include mitigating "the dangers of untrustworthiness" and helping "to guarantee that the accused gives a fully accurate statement to the police and that the statement is rightly reported by the prosecution at trial." *Miranda* v. *Arizona*, *supra* at

469-470. Thus, the role of counsel at post-indictment interrogation need not be relatively limited, unimportant, or unidimensional.[11]

Indeed, the subtleties of post-indictment, secret interrogation, by a law-enforcement adversary preparing for trial may be far greater than the subtleties involved in jury voir dire or other trial events. During post-indictment questioning, it is of paramount importance that questions and answers be unambiguous, comprehended, fairly stated, and responsive, as well as accurate and "rightly reported" to the prosecutor. Further, reality and experience teach us that law enforcement officers and civilians, including those accused of crimes, often do not speak the same language. *See, e.g., United States* v. *Marshall*, 488 F2d 1169, 1171 fn. 1 (9th Cir 1973) (agents often speak an almost "impenetrable jargon".) It is the *presence* of counsel at post-indictment interrogation which may prevent distortion of the truth-seeking function.[12]

Nor is it appropriate to suggest that there need be no concern for the concept of deterrence. In a close case, such as this one, a police officer may be sorely tempted to engage in pretrial interrogation in an effort to prepare for trial, buttress the state's case, learn defense strategy, or even dissuade a defendant from exercising his right to

---

[11] *Cf. Patterson* v. *Illinois*, 108 S Ct 2389 (1988) fn 6,13

[12] When the Solicitor General urges that Sixth Amendment violations should not handicap the "advocates" in their ability to expose truth, the government realistically speaks of the police/agent "advocate" who takes the place of the professional prosecutor. Brief for the United States at 18. Indeed, many federal law enforcement agents are college educated or trained as lawyers. When a police officer or federal agent departs from the role of an investigator and becomes an advocate preparing for trial, serious concerns may arise concerning trustworthiness and accuracy.

testify. An officer could thereby consciously or unconsciously hinder accurate fact finding. The deliberate intrusion into the attorney-client relationship may undermine the relationship itself and detract from counsel's ability to fairly and fully present a defense.[13]

Sixth Amendment violations are thus imcomparable to Fourth Amendment harms. The precious Sixth Amendment right to counsel has long been cherished by this Court because it "stands as a constant admonition that if the constitutional safeguards it provides be lost, justice will not 'still be done'". *Johnson* v. *Zerbst*, 304 US 458, 462 (1937). As the late Chief Justice G. Mennen Williams of the Michigan Supreme Court wrote in *People* v. *Gonyea* 421 Mich 462, 477, 365 N W 2d 136 (1984):

> In light of the particular importance of the right to counsel, we are hesitant to tolerate any transgression. To permit law enforcement officers to obtain statements from the defendant in violation of his right to counsel, and to use those statements to attack the defendant and his case, would be to permit an attack on the very foundation of our criminal justice system. When the police are permitted to commit such a violation, the effect is to gnaw at the very pillars of democracy.

---

[13] *Cf. United States* v. *Shuck*, 44 Cr. L Rep. 2393 (DC N WVa) where the district judge found that government attorneys engaged in efforts to impair the relationship between defendants and their lawyers. *See also United States* v. *Morrison*, 449 US 361 (1981), where agents denigrated defense counsel, attempted to convince the defendant to relinquish her trial rights, strike a bargain with the government and "cooperate".

C. THE IMPEACHMENT EXCEPTION TO THE *MIRANDA* PROPHYLACTIC RULE, ESTABLISHED IN *HARRIS* V. *NEW YORK*, SHOULD HAVE NO APPLICATION TO THE DELIBERATE VIOLATION OF RESPONDENT'S SIXTH AMENDMENT RIGHT TO COUNSEL.

In *Miranda* v. *Arizona*, this Court utilized a prospective warning to improve the criminal justice system. By establishing and requiring a system of procedural safeguards, the Court sought to ameliorate the inherently coercive nature of custodial interrogation. Both the police and prosecution were placed on notice that adherence to these procedural rules was a necessary predicate for the admissibility of statements obtained from criminal suspects.[14] These prophylactic warnings, however, are "not themselves rights protected by the Constitution . . ." *Michigan* v. *Tucker*, 417 US 433, 444 (1974). Consequently, where police fail to adhere to the rules of *Miranda*, "sufficient deterrence flows when the evidence in question is made unavailable to the prosecution in its case in chief." *Harris* v. *New York*, 401 US 222, 225 (1970). Where there is a *Miranda* defective statement by the defendant, it may be used for impeachment purposes so long as it is trustworthy, voluntary, and uncoerced. This is so because of the importance of the criminal trial's function as a search for the truth and the need not to transform the prophylactic *Miranda* warnings into a license for perjury. *Harris*, 401 US at 226. *See also Oregon* v. *Hass*, 420 US 714 (1975).

---

[14] Petitioner also offers an elaborate footnote (footnote 6, pages 69 through 72) critical of *Miranda* and *Edwards*. But see "Criminal Justice In Crisis", American Bar Association, Special Committee on Criminal Justice in a Free Society at 27-34, which concludes that Miranda does *not* have a significant impact on law enforcement's ability to solve crime or achieve successful prosecutions.

Where a defendant's statement lacks voluntariness or involves a direct violation of the Fifth Amendment itself, then that statement may not be used for any purpose including impeachment. *Mincey* v. *Arizona*, 437 US 385 (1978); *New Jersey* v. *Portash*, 440 US 450 (1979). When the amendment itself is implicated, this Court found that balancing of those interests of deterrence and the truth seeking function was simply "impermissible". *Portash*, 440 US at 459.

The impermissibility of balancing, however, is not limited to violations of the Fifth Amendment alone. In a Sixth Amendment context, the Court also refuses to engage in balancing. Thus, the Court in *Brooks* v. *Tennessee*, 406 US 605 (1971), invalidated a "truth in testimony law" which required a criminal defendant to testify before any other defense witness.[15] The purpose of that statutory requirement was entirely consistent with the aim of promoting the truth seeking function of trial. But the law was invalid not only because it imposed an inappropriate restriction on a defendant's Fifth Amendment decision to testify or remain silent, but also because it denied defendant "the guiding hand of counsel at every step in the proceedings against him". *Brooks*, 406 US at 612 (quoting *Powell* v. *Alabama*, 287 US 45, 69 (1932)).

The Court has reached analogous results even when there were significantly less serious restrictions, despite assertions that the truth seeking function of trial might suffer. In *Geders* v. *United States*, 425 US 80 (1976), the Court determined that the trial court reversibly erred in forbidding consultation between defendant and counsel in an overnight recess during defendant's trial testimony.[16]

---

[15] See Brief for Respondent State of Tennessee No. 71-5313 at 6.

[16] A similar restriction in a mere 15-minute recess during a defendant's testimony falls on the other side of the constitutional line. *Perry* v. *Leeke*, 102 L Ed2d 624 (1989).

It is evident that where core values of Fifth or Sixth Amendment rights are involved, the interests of preserving those values must be served aside from contentions that the truth seeking function may be impaired.

Petitioner's restrictive view of the role of counsel is contradicted by this Court's long standing body of Sixth Amendment jurisprudence. On this record there is no support for any implied invitation by petitioner to redefine the parameters of the Sixth Amendment.

The right to counsel concerns fairness not just at the trial itself, but at every critical stage preceding it. *See, e.g., Coleman* v. *Alabama*, 399 US 1 (1970) (remanded for determination whether a lack of counsel at pre-indictment preliminary hearing prejudiced defendants at trial); *Hamilton* v. *Alabama*, 368 US 52, 54 (1961) (absence of counsel at post-indictment arraignment "may affect the whole trial"); *Massiah* v. *United States*, *supra* (post-indictment conversation with government informant monitored by police); *United States* v. *Wade*, 388 US 218 (1967) (post-indictment lineup).

Admittedly, before the decision to prosecute, the state has a strong interest in conducting interrogations. After initiation of formal charges, however, the state should have no legitimate need to engage in private inquisition to further prepare its case for trial. Where police feel constrained to engage in post-indictment, counselless questioning as advocates or adversaries, there likely are enhanced possibilities for gamesmanship, deception, and ultimately untrustworthiness. This unacceptable result is more likely if the Sixth Amendment is depreciated and the right to counsel is deemed comparable to the prophylactic warnings required by *Miranda*. Where the state deliberately violates the right to counsel, the need to preserve the right itself should render balancing impermissible.

Respondent commends a reading of *Michigan* v. *Jackson*, 475 US 625 (1986) as an application of these principles rather than as a formulation of a prophylactic rule akin to *Miranda* warnings or the "protective umbrella" of *Edwards*. *Solem* v. *Sturnes*, 465 US 638, 644, n. 4 (1984). To respondent this is so because the adversarial process in *Jackson* had commenced and the post arraignment interrogations there implicated the constitutional guarantee itself. To deprive a defendant of this substantive constitutional right in this setting "may be more damaging than denial of counsel during the trial itself." *Maine* v. *Moulton*, 474 US at 170 (1985). Or, as stated in *Michigan* v. *Jackson*, 475 US at 632, "after a formal accusation has been made . . . the constitutional right to the assistance of counsel is of such importance that the police may no longer employ techniques for eliciting information from an uncounseled defendant that might have been entirely proper at an earlier stage of their investigation."

Even assuming arguendo that *Michigan* v. *Jackson* only establishes a prophylactic rule (a violation of which petitioner admits), the record in this case reflects a constitutional deprivation of Tyris Harvey's right to counsel, not only a breach of that prophylactic rule. Willful, deliberate disregard for respondent's right to counsel and the affirmative misrepresentation that counsel was unnecessary constitute a Sixth Amendment violation. It was a violation which penetrates the core value of that constitutional guarantee and therefore strikes at the integrity of the trial process itself. It cannot be suggested that respondent is not entitled to judicial relief. *United States* v. *Morrison*, 449 US 361 (1981).

Nor should the onus be placed on respondent to obviate or mitigate the harm by forfeiting his right to testify.[17] To

---

[17] A defendant has a due process right to testify at trial. *Brooks* v.

suggest that deliberate misconduct by the state need not be deterred, as the Solicitor General contends, is to condone it and encourage it as well.[18] The state's disrespect for the right to counsel here raises serious concern. If the state is permitted to engage in such conduct or benefit from it, then the integrity and reliability of the trial process is impaired. In *Portash*, *supra*, the defendant's presumably truthful and reliable grand jury testimony could not be used for impeachment purposes without doing violence to the Fifth Amendment just as respondent's statement six days before trial cannot be used without eviscerating his Sixth Amendment right. *See Meadows* v. *Kuhlmann*, 812 F2d 72 (2d Cir), *cert denied*, 482 US 915 (1987); *United States* v. *Brown*, 699 F2d 585 (2d Cir. 1983). *See also People* v. *Gonyea*, 421 Mich 462, 365 NW2d 136 (1984). Various commentators concur in the submission that statements obtained in contravention of the Sixth Amendment should not be permitted for impeachment purposes. *See* Comment, "The Impeachment Exception to the Sixth Amendment Exclusionary Rule", 87 Col. L. Rev. 176 (1987); Comment, "Application of the Impeachment Exception to the Sixth Amendment Exclusionary Rule: Seeking a Resolution Based on the Substance of the Right to Counsel", 50 Albany L. Rev. 343 (1986).

Incredibly, petitioner here apparently seeks blanket authority for the police to interrogate defendants at any

---

Tennessee, 406 US 605, 612 (1972) ("Whether the defendant is to testify is an important tactical decision as well as a matter of constitutional right.") It violates due process for a defendant to be forced to sacrifice one constitutional right to enforce another. *Simmons* v. *United States*, 390 US 377, 393-4 (1968).

[18] *Cf. Moran* v. *Burbine*, 475 US 412 (1986). *See* Pitofsky, "A Missed Opportunity to Curb Police Deception of Criminal Defense Attorneys", 25 American Cr. L. Rev. 89 (1987).

time after they have been accused and without any notice to their counsel. The logical import of petitioner's contention is that the police should be free to conduct such interrogations whenever and as often as they like, even during the trial itself. Of course, those most likely to have their Sixth Amendment rights violated are those defendants already in the custody of the state, especially indigent persons like respondent Harvey. And license to engage in such activity can only result in substantial numbers of pre-trial or mid-trial evidentiary hearings, which will be disruptive, as well as impair the role of counsel that is so "critical to the ability of the adversarial system to produce just results." *Strickland* v. *Washington*, 466 US 668, 685 (1984).

Moreover, in this instance, the police are the "alter ego" of the prosecutor. Neither the courts nor the legal profession would condone the conduct here in the context of civil litigation. In *United States* v. *Springer*, 460 F2d 1344, 1354 (7th Cir. 1972), then Circuit Judge Stevens in dissent observed:

> "The work of the agents was trial preparation, pure and simple. In a civil context I would consider this behavior unethical and unfair. In a criminal context I regard it as such a departure from procedural regularity as to violate the due process clause of the Fifth Amendment. 460 F2d at 1355.

See also United States v. *Hammad*, 846 F2d 854 (2d Cir. 1988) (government argued alternatively that DR7-104(A)(1) becomes operative after Sixth Amendment rights have attached); *United States* v. *Thomas*, 474 F2d 110 (10th Cir.), *cert. denied* 412 US 932 (1973).

In short, the adversary process cannot function properly if the state is left free to circumvent or defile the right to counsel at whim. Permitting the state to impeach a

defendant with a statement taken in violation of the Sixth Amendment would destroy the constitutional guarantee "essential to any fair trial of a case against a prisoner" (*Powell* v. *Alabama*, 287 US at 70). The right to counsel would become meaningless.[19]

CONCLUSION

For the reasons stated herein, the judgment of the Michigan Court of Appeals should be affirmed.

Respectfully submitted,

ROBERT M. MORGAN
2180 Penobscot Building
Detroit, MI 48226
(313) 961-7070
Counsel for Respondent

---

[19] The question of a valid waiver is not before the Court, yet the Solicitor General argues that respondent waived his right to counsel. Brief For The United States fn 8 at 23. As indicated earlier, the trial prosecutor admitted that the statement was *Miranda* defective. The showing necessary for a waiver of counsel has been equated to that necessary to demonstrate a waiver of the right to trial by jury. *Boykin* v. *Alabama*, 395 US 238 (1969). A valid waiver is not shown unless it is demonstrated that there is an understanding and intelligent relinquishment of a known right. *Tague* v. *Louisiana*, 444 US 469 (1980). The prosecutor's burden to demonstrate a waiver is not only a heavy one, but courts indulge in every reasonable presumption against finding one. *North Carolina* v. *Butler*, 441 US 369 (1979). *See also Carnley* v. *Cochran*, 369 US 506 (1962)

No. 88-512

In the Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MICHIGAN, PETITIONER

v.

TYRIS LEMONT HARVEY

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
CHRISTINE DESAN HUSSON
Assistant to the Solicitor General
J. DOUGLAS WILSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

QUESTION PRESENTED

Whether respondent's direct testimony at trial could be impeached with a statement obtained from him in violation of *Michigan* v. *Jackson*, 475 U.S. 625 (1986).

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases – Continued: Page

Constitution: Page

U.S. Const.:

In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-512

STATE OF MICHIGAN, PETITIONER

v.

TYRIS LEMONT HARVEY

ON WRIT OF CERTIORARI TO THE MICHIGAN COURT OF APPEALS

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

INTEREST OF THE UNITED STATES

This case presents the question whether statements obtained from a defendant in violation of the rule adopted in *Michigan* v. *Jackson*, 475 U.S. 625 (1986), may be used to impeach the defendant if he testifies at trial. Because the *Michigan* v. *Jackson* rule protects the Sixth Amendment right to counsel, the issue can arise in both federal and state prosecutions.[1] The United States therefore has a law enforcement interest in the outcome of this case.

[1] Federal and state courts have reached divergent results on the issue whether a defendant may be impeached by statements obtained in violation of the Sixth Amendment. Cases permitting impeachment include *United States* v. *Lott*, 854 F.2d 244 (7th Cir. 1988); *United States* v. *McManaman*, 606 F.2d 919 (10th Cir. 1979); *United States* v. *Taxe*, 540 F.2d 961 (9th Cir. 1976), cert. denied, 429 U.S. 1040 (1977); *State* v. *Thomas*, 698 S.W.2d 942 (Mo. 1985); *People* v. *Maerling*, 64 N.Y.2d 134, 485 N.Y.S.2d 23, 474 N.E.2d 231 (1984); and *State* v. *Swallow*, 405 N.W.2d 29 (S.D. 1987). Cases prohibiting impeachment

STATEMENT

1. On June 11, 1986, respondent rang the doorbell of Audrey Sharp's house in Detroit, Michigan, and asked to use the telephone. Sharp, according to her trial testimony, admitted respondent into the house. Shortly thereafter, while Sharp was sitting at her kitchen table, respondent approached her from behind holding a barbecue fork. After he ordered her to get up, Sharp grabbed respondent's hand. A struggle began, during which respondent tried to push Sharp toward the basement. Sharp resisted, and when respondent put his hand over Sharp's mouth, she bit him on the hands and arm. Respondent then bit Sharp on the back, threw her to the floor, and punched her repeatedly in the face. Sharp escaped to the living room, but respondent followed her with the barbecue fork and a pair of garden shears. Respondent then ordered Sharp to remove her clothing, after which respondent forced her to submit to oral sex and raped her. Tr. 12-27, 55-70, 75.

Respondent was subsequently arrested in connection with the incident. On the morning of July 2, respondent gave a statement to a police officer in which he claimed that he and Sharp had fought because Sharp had refused to pay for cocaine that respondent had shared with her. Respondent denied that any sexual contact had occurred between him and Sharp. When the officer presented the three-page statement to him to sign, respondent signed the first page, but he refused to sign the last two pages because, in respondent's words, the officer "wrote some stuff I didn't like * * * something that wasn't pertaining to

---

include *Meadows* v. *Kuhlmann*, 812 F.2d 72 (2d Cir.), cert. denied, 482 U.S. 915 (1987); *United States* v. *Brown*, 699 F.2d 585 (2d Cir. 1983); *Bishop* v. *Rose*, 701 F.2d 1150 (6th Cir. 1983); *People* v. *Knippenberg*, 66 Ill. 2d 276, 362 N.E.2d 681 (1977); and *People* v. *Gonyea*, 421 Mich. 462, 365 N.W.2d 136 (1984).

what happened." Pet. App. 2a. Respondent then requested an attorney, and the interrogation ceased. Later that day, respondent was arraigned on charges of criminal sexual conduct, and counsel was appointed for him. Pet. App. 3a.

On September 9, 1986, six days before trial, respondent told a police officer that he wanted to make another statement. He added that he did not know if he should talk to his lawyer first. The officer told respondent that he did not need to talk to his lawyer, because his lawyer would receive a copy of the statement in any event. Pet. App. 3a; J.A. 32-33; Tr. 117. Respondent then signed a constitutional rights waiver form. He initialed the portions of the form advising him of his right to remain silent (including the right not to answer questions or make statements), his right to have a lawyer present before or during questioning, and his right to have a lawyer appointed for him. He did not initial the portion of the form advising him of his right to decide to stop answering questions at any time, or the portion advising him that anything he said could be used against him in court. When asked if he understood his constitutional rights, respondent answered that he did. Pet. App. 3a-4a. Respondent then gave a statement that differed in a few respects from the testimony he would give at trial, and differed significantly from the statement he had given on July 2.

2. Testifying in his own behalf, respondent gave a very different account of the events of June 11 from the account given by Sharp. Respondent testified that he had seen Sharp outside her house and had asked her if she wanted to share some cocaine. He then went into Sharp's house and, after smoking some of the cocaine, asked her if she would have sex with him in return for the cocaine. According to respondent, Sharp agreed to that proposal, but

at that point Sharp's sister arrived. Respondent testified that he and the victim's sister left the house to purchase more cocaine and later returned. According to respondent, another man then arrived at the house and left with Sharp's sister. J.A. 5-6, 13-14; Tr. 98-99, 104.

Respondent testified that after the others had left, he again asked Sharp to have sex with him, but this time she refused. Respondent claimed that he and Sharp argued, that she stabbed him with a fork and bit his arm, and that he then punched Sharp in the face and bit her on the back. Respondent testified that after further argument, Sharp acquiesced in his request for sex. According to respondent, however, the cocaine had hindered his ability to engage in sexual activity, and he never actually had sexual intercourse with Sharp. J.A. 6-8, 15-20; Tr. 99-100, 105-108.

On cross-examination, the prosecutor used respondent's July 2 statement to impeach his testimony. Specifically, the prosecutor asked why respondent's July 2 statement omitted certain portions of the story respondent told at trial. J.A. 23-31; Tr. 110-116. Respondent replied that he had given the police investigator some of the information he had recounted in his trial testimony, but that the investigator had failed to include those details in the written statement. J.A. 27-29; Tr. 113-114. Respondent also denied saying some of the things that were attributed to him in the July 2 statement. J.A. 30-31; Tr. 115. Respondent's counsel did not object to that cross-examination.

The prosecutor then asked respondent whether he had given the police a statement on September 9. J.A. 31-32; Tr. 116. Defense counsel objected to the use of the September 9 statement "for substantive evidence," but when the prosecutor explained that she would only be using it for impeachment, defense counsel did not interpose

any further objection. J.A. 32-34; Tr. 117. The prosecutor then asked petitioner about several points that were included in his trial testimony but omitted from his September 9 statement. J.A. 34-39; Tr. 118-121.

3. Respondent was convicted and sentenced to a term of six to ten years' imprisonment. On appeal, respondent challenged the use of both the July 2 and September 9 statements to impeach him. The Michigan Court of Appeals upheld the use of the July 2 statement. It ruled that, despite the lack of any showing in the record that respondent had received *Miranda* warnings prior to making that statement, the use of the statement for impeachment purposes did not violate respondent's Fifth and Fourteenth Amendment rights because the statement had not been involuntary. Pet. App. 5a-6a.

The court reached a different result with regard to the September 9 statement. That statement, the court held, was obtained from respondent "in violation of [his] Sixth Amendment right to counsel." Pet. App. 6a-7a (citing *Michigan* v. *Jackson*, 475 U.S. 625 (1986)). According to the court, "[a] statement so acquired may not be used for any purpose, including impeachment." Pet. App. 7a. The court noted that respondent's counsel did not object to the use of the September 9 statement for impeachment purposes, but the court nonetheless found the use of that statement to be constitutional error. Finally, the court held that the admission of the statement was not harmless error, because the trial "involved a credibility contest between defendant and victim." *Ibid.* The court therefore reversed respondent's convictions.[2] The Michigan Supreme Court, with three justices dissenting, denied the State leave to appeal. Pet. App. 8a-9a.

---

[2] The "state court decision fairly appears to rest primarily on federal law" as required by *Michigan* v. *Long*, 463 U.S. 1032, 1040

SUMMARY OF ARGUMENT

A. It is a "general rule" of our system of justice that "remedies should be tailored to the injury suffered from [a] constitutional violation and should not unnecessarily infringe on competing interests." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Consistently with that principle, this Court has held that violations of the Fourth Amendment are sufficiently redressed at trial when the government is prohibited from using unlawfully obtained evidence as part of its case in chief. The futher prohibition against the use of illegally seized evidence to impeach is not required for deterrent purposes, and it undermines the truth-seeking goal of the criminal trial. See *United States* v. *Havens*, 446 U.S. 620 (1980); *Walder* v. *United States*, 347 U.S. 62 (1954).

Because of similarities in the operation of the exclusionary rules under the Fourth and Sixth Amendments, the same principles should apply to statements obtained as a result of pretrial interrogation conducted in violation of the Sixth Amendment. The Sixth Amendment, like the Fourth Amendment, does not expressly require the exclusion of evidence at trial; that remedy is the product of a

---

(1983). The state court of appeals clearly defined the question as a "Sixth Amendment right to counsel" issue. Pet. App. 6a. After citing *Michigan* v. *Jackson* in order to identify the type of Sixth Amendment violation involved, the court supported its conclusion that the disputed evidence had to be excluded by citing two federal appellate court decisions. It then noted simply that "Michigan law is consistent." Pet. App. 7a. Cf. *Delaware* v. *Van Arsdall*, 475 U.S. 673, 678 n.3 (1986). Should there be any doubt, Michigan law rests upon a decision, *People* v. *Gonyea*, 421 Mich. 462, 365 N.W.2d 136 (1984), in which the deciding vote was cast by a concurring judge who appeared to rely solely upon the Sixth Amendment in ruling that evidence obtained without a valid waiver is inadmissible for impeachment. See 421 Mich. at 481-483, 365 N.W.2d at 145 (Cavanagh, J., concurring).

court-made rule designed to enforce the constitutional prohibition. And the Court has held that the application of the Sixth Amendment exclusionary rule, like the Fourth Amendment exclusionary rule, must be determined by balancing the societal costs of the rule against its benefits. *Nix* v. *Williams*, 467 U.S. 431, 446 (1984).

The interest in promoting the truth-seeking process is at its greatest when one party to the trial seeks to demonstrate that the other party is relying on false evidence. For that reason, the case against the exclusion of reliable evidence at trial is at its strongest when impeachment evidence is at issue. And, as in the Fourth Amendment context, the deterrent effect of the Sixth Amendment exclusionary rule is adequately served by the exclusion of improperly obtained evidence from the government's case in chief; the marginal deterrent effect of excluding the evidence for impeachment purposes is insufficient to overcome the overriding interest in protecting the truth-seeking process at trial.

If anything, the argument in favor of exclusion is weaker in the Sixth Amendment context than in the Fourth Amendment setting. The underlying purpose of the Sixth Amendment is to ensure that the defendant has counsel so that the adversary process will function effectively to achieve justice. Because the Sixth Amendment is intended to promote the effective operation of the adversary system, this Court in its Sixth Amendment decisions has focused not only on the right to counsel, but more generally on "the ability of the adversary system to produce just results." *Strickland* v. *Washington*, 466 U.S. 668, 689, 692 (1984). Because the exposure of false testimony is perhaps the most important function of the adversary process, permitting the use of evidence for im-

peachment purposes is consistent with the purposes of the Sixth Amendment, even if the evidence was improperly obtained.

B. The argument for admitting respondent's pretrial statement is particularly strong in this case, because the violation found by the court here was not a direct violation of the Sixth Amendment, but a violation of the prophylactic rule adopted by this Court in *Michigan* v. *Jackson*, 475 U.S. 625 (1986). That rule provides that unless the defendant initiates contact with the police, a court may not recognize a waiver of the Sixth Amendment right to counsel once the defendant has made a request for counsel.

This Court has previously held that violations of the prophylactic rule adopted in *Miranda* v. *Arizona*, 384 U.S. 436 (1966), are adequately deterred by barring the affirmative use of improperly obtained evidence; the Court has declined in that setting to require the exclusion of evidence offered for impeachment purposes. See *Harris* v. *New York*, 401 U.S. 222 (1971); *Oregon* v. *Hass*, 420 U.S. 714 (1975).

The same analysis applies in this case. As in the case of violations of the prophylactic rule designed to protect the Fifth Amendment privilege against compulsory self-incrimination, violations of the rule in *Jackson* do not require the exlusion of evidence for impeachment purposes. The Court's recent decision in *Patterson* v. *Illinois*, 108 S. Ct. 2389 (1988), removes any doubts on that score. The Court in *Patterson* held that the warnings required by this Court in *Miranda* are sufficient to support a waiver of the right to counsel under the Sixth Amendment. In the case of pretrial interrogation, the Court explained, an attorney serves the same "limited purpose" whether the interrogation occurs before or after the initiation of formal charges.

In that setting there is therefore no justification for according different treatment to violations of the prophylactic rule designed to protect a suspect's rights under the Fifth Amendment and the prophylactic rule adopted in *Jackson*, which is designed to protect a defendant's rights under the Sixth Amendment.

ARGUMENT

OUT-OF-COURT STATEMENTS TAKEN WITHOUT A VALID WAIVER OF THE SIXTH AMENDMENT RIGHT TO COUNSEL MAY BE USED FOR IMPEACHMENT PURPOSES AT TRIAL

A. The Sixth Amendment Exclusionary Rule Should Be Applied In This Setting In The Same Manner As The Fourth Amendment Exclusionary Rule

1. This Court has long held that evidence obtained in violation of the Fourth Amendment may be used to impeach a defendant's testimony at trial. In *Walder* v. *United States*, 347 U.S. 62 (1954), the Court ruled for the first time that the Fourth Amendment exclusionary rule, which bars the affirmative use of illegally seized evidence, should not be extended to bar the use of that evidence for impeachment purposes. The defendant in *Walder*, who had been indicted for trafficking in narcotics, took the stand and denied that he had ever possessed or sold narcotics. *Id.* at 63. After he reiterated his testimony on cross-examination, the government introduced evidence that the defendant had possessed heroin two years earlier. Although that evidence was the product of an illegal search, the Court held that the defendant's assertion that he had never possessed narcotics "opened the door, solely for the purpose of attacking the defendant's credibility," to evidence that the government had previously seized in violation of the Fourth Amendment. *Id.* at 64.

The Court applied the same principles in *United States* v. *Havens*, 446 U.S. 620 (1980). There, the defendant took the stand and denied that he had been involved in the cocaine smuggling scheme with which he was charged. On cross-examination, the defendant denied that he had possessed certain incriminating material when he returned to this country from a trip abroad. The government then introduced evidence that law enforcement officers had illegally seized from his luggage.[3] The Court approved the admission of the improperly obtained material to impeach the defendant's testimony.

In both *Walder* and *Havens*, this Court reasoned that the benefits of the exclusionary rule must be weighed against its costs. The Court emphasized that arriving at the truth is "a fundamental goal of our legal system." *Havens*, 446 U.S. at 626. It reaffirmed that a defendant's election to testify includes the obligation to testify truthfully, and it found "essential * * * to the proper functioning of the adversary system" the government's ability to conduct "proper and effective cross-examination * * * [of] seemingly false statements." *Havens*, 446 U.S. at 626-627; see also *Walder*, 347 U.S. at 65. Against these values, the Court balanced the deterrent function of the exclusionary rule. See *Havens*, 446 U.S. at 626-627. It determined that the purposes of the exclusionary rule are adequately served by denying the government the ability to make affirmative use of illegally procured evidence, and it deemed the "incremental furthering" of deterrence achieved by forbidding the impeachment of a testifying defendant insuffi-

---

[3] The defendant's traveling companion had been stopped upon arriving in the United States; a search revealed that he had cocaine sown into makeshift pockets on his shirt. Police acting without a warrant found in the defendant's suitcase a T-shirt from which pieces that matched the makeshift pockets on his friend's shirt had been cut. *United States* v. *Havens*, 446 U.S. 620, 621-622 (1980).

cient "to permit or require that false testimony go unchallenged, with the resulting impairment of the integrity of the factfinding goals of the criminal trial." *Id.* at 627.

The Court's decisions in *Walder* and *Havens* reflect a more general principle that the rules that constrain the government in its direct case do not necessarily apply to matters of rebuttal and impeachment. In order to avoid a serious distortion of the truth-seeking process, the Court has permitted the government in a number of settings to use evidence for impeachment purposes even if the government would not be permitted to use the same evidence affirmatively. See, *e.g.*, *Tennessee* v. *Street*, 471 U.S. 409 (1985) (government may offer into evidence a co-defendant's confession, otherwise inadmissible under *Bruton* v. *United States*, 391 U.S. 123 (1968), to correct a potentially misleading impression created by the defendant's testimony); *Jenkins* v. *Anderson*, 447 U.S. 231 (1980) (government may impeach a testifying defendant with his failure to tell his exculpatory story prior to his arrest); *Doyle* v. *Ohio*, 426 U.S. 610, 619-620 n.11 (1976) (government may impeach a defendant with his failure to tell his exculpatory story after receiving *Miranda* warnings if defendant testifies that he did tell that story to the police after his arrest); *Harris* v. *New York*, 401 U.S. 222 (1971) (government may impeach a testifying defendant with a statement taken in violation of *Miranda* v. *Arizona*, 384 U.S. 436 (1966)). The Court's rulings in each of those cases, as in *Walder* and *Havens*, evidences the Court's recognition that the truth-seeking process is more seriously distorted if false testimony is permitted to go uncorrected than if reliable evidence is kept from the jury in the first instance.

2. The same principles should apply to statements obtained through pretrial interrogation conducted in viola-

tion of the Sixth Amendment. Although the Sixth Amendment exclusionary rule forbids the affirmative use of such statements, the strong policy of promoting the truth-finding process at trial outweighs the justification for extending the Sixth Amendment exclusionary rule to evidence that is offered for impeachment purposes.

The Sixth Amendment right to counsel is similar in some important respects to the Fourth Amendment right to be free from illegal searches and seizures. Like the Fourth Amendment, the Sixth Amendment imposes obligations on the government that can be violated before trial. After arraignment or its equivalent, "government efforts to elicit information from [an] accused, including interrogation, represent 'critical stages' at which the Sixth Amendment applies." *Michigan* v. *Jackson,* 475 U.S. at 630. Thus, the police may violate the Sixth Amendment if they elicit statements from an indicted defendant who has not validly waived his right to counsel. See *Brewer* v. *Williams,* 430 U.S. 387 (1977). They also may violate the Sixth Amendment if they deliberately elicit incriminating statements from an uncounseled defendant who does not realize that he is speaking to a state agent or informant. *Maine* v. *Moulton,* 474 U.S. 159, 176 (1985); *United States* v. *Henry,* 447 U.S. 264, 274 (1980); see *Massiah* v. *United States,* 377 U.S. 201 (1964).

Unlike the Fifth Amendment, which explicitly prohibits the use of compelled self-incriminating testimony, neither the Fourth Amendment nor the Sixth Amendment expressly requires the exclusion of unlawfully obtained evidence. Nor is exclusion mandated by concerns about the probative character or reliability of such evidence. To the contrary, evidence obtained in violation of the Fourth or Sixth Amendment right to counsel is generally "the most probative information" available but is excluded

without regard to its reliability. *Stone* v. *Powell*, 428 U.S. 465, 490 (1976); *Moulton*, 474 U.S. at 191 (Burger, C.J., dissenting); *Henry*, 447 U.S. at 289 (Rehnquist, J., dissenting); *Massiah*, 377 U.S. at 208-209 (White, J., dissenting); *Mapp* v. *Ohio*, 367 U.S. 643, 656 (1961). And evidence taken in violation of the Fourth or the Sixth Amendment typically is not "coerced" or "compelled," as is the case with evidence obtained in violation of the Fifth Amendment. See *Massiah*, 377 U.S. at 209-211 (White, J., dissenting).

Evidence that is coerced or compelled in violation of the Fifth Amendment may not be used either affirmatively or for impeachment purposes. See *New Jersey* v. *Portash*, 440 U.S. 450, 459 (1979); *Mincey* v. *Arizona*, 437 U.S. 385, 397-398 (1978). As the Court has explained, the admission of such evidence for either purpose would directly contravene the prohibition in the Fifth Amendment against compelling a person "to be a witness against himself" or would be so unreliable that its use at trial for any purpose would violate due process. By contrast, the impeachment use of evidence seized in violation of the Fourth or Sixth Amendments does not violate the express terms of any constitutional provision, but simply brings into question whether to apply a court-made exclusionary rule.

This Court has chosen the exclusionary rule to remedy Sixth as well as Fourth Amendment violations. *Mapp* v. *Ohio*, 367 U.S. at 648, 656 (Fourth Amendment); *Weeks* v. *United States*, 232 U.S. 383, 391-393 (1914) (Fourth Amendment); *Moulton*, 474 U.S. at 180 (Sixth Amendment); *Henry*, 447 U.S. at 282 n.6 (Blackmun, J., dissenting) (Sixth Amendment). The question whether to invoke the Sixth Amendment exclusionary remedy, like the analogous question with respect to the Fourth Amendment exclusionary rule, may be answered by balancing the

societal costs of the rule against its benefits. *Nix* v. *Williams*, 467 U.S. 431, 446 (1984). Because the Fourth and Sixth Amendments extend their protection in similar ways, the same considerations that the Court weighed in *Walder* and *Havens* are relevant in the present setting, and they dictate that the balance be struck in the same way.

a. On one side of the balance is the interest in accurate verdicts. "[T]he central purpose of a criminal trial is to decide the factual question of the defendant's guilt or innocence." *Delaware* v. *Van Arsdall*, 475 U.S. 673, 681 (1986); *Stone*, 428 U.S. at 490; *United States* v. *Nobles*, 422 U.S. 225, 230 (1975). There is a weighty public interest in "prosecuting those accused of crime and having them acquitted or convicted on the basis of all the evidence which exposes the truth." *Alderman* v. *United States*, 394 U.S. 165, 175 (1969). As this Court has stated repeatedly, a constitutional violation warrants the exclusion of evidence only if the benefits from exclusion are worth "the enormous societal cost of excluding truth in the search for truth in the administration of justice." *Nix*, 467 U.S. at 445; see also *Solem* v. *Stumes*, 465 U.S. 638, 650 (1984); *Havens*, 446 U.S. at 626-628; *Hass*, 420 U.S. at 722; *Harris*, 401 U.S. at 224-226; *Alderman*, 394 U.S. at 174-175.

When the Court is weighing the exclusion of evidence that is intended to aid the jury in assessing the credibility of a defendant's testimony, an additional factor bears on the inquiry. In that setting, the general interest in promoting accurate factfinding is enhanced by the special need to guard against perjury.

The right of every defendant to testify includes the obligation to testify truthfully.[4] The introduction of

---

[4] "Every criminal defendant is privileged to testify in his own defense, or to refuse to do so. But that privilege cannot be construed

evidence for impeachment enforces that obligation by allowing the contradiction of "seemingly false statements" the defendant makes on the stand. *Havens,* 446 U.S. at 627. It would be senseless if the right to the assistance of counsel, which exists "to assure that the accused's interests will be protected consistently with our adversary theory of criminal prosecution" (*United States* v. *Wade,* 388 U.S. 218, 227 (1967)), were interpreted to prohibit the prosecution, when faced with apparently perjurious testimony, from "utiliz[ing] the traditional truth-seeking devices of the adversary process" (*Harris*, 401 U.S. at 225).

b. On the other side of the balance is the marginal deterrent effect that would be served by barring the impeachment use of evidence obtained in violation of the Sixth Amendment. For several reasons, the interest in deterrence is even smaller in the Sixth Amendment context than in the Fourth Amendment setting.

First, the difference in the elements of Fourth and Sixth Amendment violations may make deterrence a less compelling concern under the Sixth Amendment. A Fourth Amendment violation is complete at the time of the illegal search or seizure; the introduction of the illegally seized evidence is not an element of the violation. By contrast, the pretrial interrogation of a defendant in the absence of his counsel does not, in itself, make out a Sixth Amendment violation; the violation is complete only when the defendant's statement is introduced against him in a prosecution for the crime with which he was charged at the

---

to include the right to commit perjury. * * * Having voluntarily taken the stand, petitioner was under an obligation to speak truthfully and accurately." *Harris*, 401 U.S. at 225; see also *Havens*, 446 U.S. at 626; *Oregon* v. *Hass*, 420 U.S. 714, 723 (1975); *Walder*, 347 U.S. at 65.

time of the interrogation. See *Massiah*, 377 U.S. at 206 (Sixth Amendment violation is complete "when there [is] used against [a defendant] at his trial evidence of his own incriminating words"). An uncounseled pretrial interrogation may be perfectly proper, for example, if the evidence is introduced in connection with offenses with which the defendant was not charged at the time of the interrogation. See *Moulton*, 474 U.S. at 178-180 & n.16. Accordingly, in that setting, there is no Sixth Amendment violation until and unless the prosecution offers the fruits of the interrogation into evidence at the trial on the already-charged crimes. For that reason, there is no misconduct to deter, since the government's out-of-court conduct does not amount to a constitutional violation, and since the court can prevent the constitutional violation from coming to pass simply by excluding the evidence from the government's case in chief at trial.

Secondly, as this Court recognized in *Jackson*, the police conducting a pretrial interrogation often may not be aware that the defendant has requested counsel. The Court has held in *Jackson* that knowledge of the request for counsel must be imputed to the police, see 475 U.S. at 634, and evidence obtained as a result of such an interrogation must be excluded from the government's case in chief regardless of the officers' ignorance of the invocation of counsel. Nonetheless, the exclusion of evidence for all purposes in that setting is not likely to serve a significant deterrent purpose, since the police will have no reason to refrain from seeking a waiver of the defendant's Sixth Amendment rights and questioning him if they are unaware that he has requested counsel.

Finally, even if the interest in deterrence were the same in the case of the Fourth and Sixth Amendment exclusionary rules, this Court has already held in the Fourth Amendment setting that the marginal deterrence achieved by the exclusion of evidence offered for impeachment pur-

poses is not sufficient to justify its costs. The same analysis applies in the Sixth Amendment context. There is no reason to suppose that deterrence is more effective or more essential in the Sixth Amendment context than in the Fourth Amendment setting; there is therefore no reason to exclude evidence under a Sixth Amendment rationale if similar evidence would not be excluded under the Fourth Amendment.[5]

3. To be sure, the analogy between the Fourth and Sixth Amendments is imperfect because of the different purposes served by the two provisions. Again, however, that difference argues against the exclusion of evidence offered for impeachment purposes, not in its favor.

The purpose of the Sixth Amendment is to ensure that in the operation of the adversary process, the defendant is not unfairly disadvantaged by being forced to confront the professional prosecutor and the technicalities of the criminal justice system without trained legal assistance. *United States* v. *Ash*, 413 U.S. 300, 306-313 (1973). Thus, the Sixth Amendment guarantee of counsel exists "not for its own sake, but because of the effect it has on the ability of the accused to receive a fair trial." *United States* v. *Cronic*, 466 U.S. 648, 658 (1984). The "fair trial" that the Sixth Amendment seeks to ensure is a trial in which "a defendant has the assistance necessary to justify reliance on the

---

[5] In *Oregon* v. *Hass*, 420 U.S. 714, 723 (1975), the Court acknowledged that an officer may have some incentive to disregard a suspect's invocation of his right to counsel, since the officer may have little to lose and something to gain "by way of possibly uncovering impeachment material." That "speculative possibility," however, was not sufficient to persuade the Court to require the exclusion of highly probative evidence that may be the only available antidote to false testimony at trial. Precisely the same analysis applies here; indeed, the only difference between this case and *Hass* is that in this case the defendant had been formally charged and in *Hass* he had not been.

outcome of the proceeding." *Strickland* v. *Washington*, 466 U.S. 668, 689, 692 (1984). Put another way, the Sixth Amendment guarantees the right to counsel "because it envisions counsel's playing a role that is critical to the ability of the adversarial system to produce just results." *Id.* at 685.

Because the purpose of the Sixth Amendment is to ensure that the adversary process functions properly, the Court's Sixth Amendment decisions have focused not only on the right of defendants to counsel, but also on "the necessity of preserving society's interest in the administration of criminal justice." *United States* v. *Morrison*, 449 U.S. 361, 364 (1981). Thus, the Court has noted, remedies for Sixth Amendment violations "should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests," *ibid.*, such as " 'the public interest in having the guilty brought to book,' " *id.* at 366 n.3 (quoting *United States* v. *Blue*, 384 U.S. 251, 255 (1966)).

When a defendant makes false statements on the stand, he jeopardizes the very "ability of the adversarial system to produce just results" that the Sixth Amendment is meant to protect. The interest in guarding against the distortion of the truth-seeking process, which is a principal goal of the Sixth Amendment, counsels strongly against unnecessarily handicapping the advocates in their ability to expose false evidence.

The use of prior inconsistent statements is one of the most effective techniques available to the advocate to expose perjury; indeed, the admissibility of prior inconsistent statements for impeachment purposes no doubt prevents much perjured testimony from ever being offered, by dissuading witnesses who otherwise would be tempted to fabricate or shade their testimony. The use of the fruits of pretrial interrogation for impeachment purposes—even

when that evidence would be barred from the government's case in chief—is therefore not at odds with the basic purpose of the Sixth Amendment to "protect[] against unfairness by preserving the adversary process in which the reliability of proffered evidence may be tested in cross-examination." *Nix*, 467 U.S. at 446.

Nor is there anything fundamentally unfair about permitting impeachment in these circumstances. As this Court noted many years ago, the advantages that a defendant enjoys in a criminal case must be "counterweighted with * * * conditions to keep the advantage from becoming an unfair and unreasonable one. The price a defendant must pay for attempting to prove [a fact] * * * is to throw open the entire subject which the law has kept closed for his benefit and to make himself vulnerable where the law otherwise shields him." *Michelson* v. *United States*, 335 U.S. 469, 478-479 (1948); see also *Havens*, 446 U.S. at 627-628 ("It is essential * * * to the proper functioning of the adversary system that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth.").

The defendant has substantial control over the ability of the prosecution to make use of pretrial statements for impeachment purposes. The prosecution can offer such prior statements only after the defendant, with the assistance of counsel, makes a voluntary decision to testify. Moreover, impeachment is permissible only if the defendant gives testimony that contradicts his previous statements. Thus, defense counsel can predict, and to a significant extent control, the possible impeachment use of prior statements. See *Jenkins* v. *Anderson*, 447 U.S. 231, 238 (1980). In addition, the defendant can explain the circumstances under which the impeaching statements were made, and defense counsel can ensure that the defendant's explanation of any inconsistency is fully aired. Presumably, the jury will be

able to recognize honest inconsistencies and appropriately discount the prosecution's reliance on minor discrepancies among the defendant's statements.

In sum, the introduction of uncounseled statements for impeachment purposes does not risk denying the defendant "a fair opportunity to present a defense at the trial itself." *Wade*, 388 U.S. at 226. The limited use of uncounseled statements for impeachment leaves "no effect of a constitutional dimension which needs to be purged to make certain that respondent has been effectively represented and not unfairly convicted." *Morrison*, 449 U.S. at 366.

B. A Violation Of The Prophylactic Rule Established By *Michigan* v. *Jackson* Is Adequately Deterred By Excluding Improperly Obtained Evidence From The Government's Case In Chief

Even if the Court is not prepared to hold that the fruits of an uncounseled pretrial interrogation should always be admissible for impeachment purposes, it should still uphold the admission of such evidence in a case such as this one, where the court found not a direct violation of the Sixth Amendment, but only a violation of the prophylactic rule of *Michigan* v. *Jackson*, 475 U.S. 625 (1986).

In *Jackson*, the Court held that once a defendant's Sixth Amendment right to counsel had attached and the defendant had requested counsel, "any [subsequent] waiver of the defendant's right to counsel for [a] police-initiated interrogation is invalid." 475 U.S. at 636. The Court's conclusion was an explicit application of the rule it had established to safeguard the Fifth Amendment privilege against compelled self-incrimination in *Edwards* v. *Arizona*, 451 U.S. 477 (1981). There, the Court held that a suspect in custody who had " 'expressed his desire to deal with the police only through counsel, is not subject to further in-

terrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.' " *Jackson*, 475 U.S. at 626 (quoting *Edwards*, 451 U.S. at 484-485).

Edwards establishes a "prophylactic rule," as does *Miranda*, to protect the Fifth Amendment privilege against compulsory self-incrimination. *Solem*, 465 U.S. at 644; see *Edwards*, 451 U.S. at 484 ("additional safeguards" necessary to protect privilege when suspect has requested counsel); *Jackson*, 475 U.S. at 639 (*Edwards* provides "second layer of protection" for the Fifth Amendment privilege). The Court in *Jackson*, expressly recognizing that *Edwards* established a "bright-line rule to safeguard pre-existing rights," adopted the "same rule" on the ground that "the need for *additional safeguards* [is] no less clear[] when the request for counsel is made at an arraignment and when the basis for the claim is the Sixth Amendment." *Jackson*, 475 U.S. at 626, 636 (emphasis added). Thus the *Jackson* rule, like the rules in *Miranda* and *Edwards*, is a prophylactic measure.[6]

This Court has already determined that violations of the prophylactic rule established by *Miranda* to guard the

---

[6] The prophylactic character of the rule in *Jackson* is evidenced by the fact that the rule is triggered only by a request for counsel: despite the fact that *all* defendants have a Sixth Amendment right to counsel after "the initiation of adversary judicial proceedings" (*United States* v. *Gouveia*, 467 U.S. 180, 187-188 (1984)), only those who make an explicit request for counsel receive the benefits of the *Jackson* no-waiver rule. See *Jackson*, 475 U.S. at 633 n.6 (right to counsel does not turn on request; but "the defendant's request for counsel [functions] as an extremely important fact in considering the validity of a subsequent waiver in response to police-initiated interrogation"); *id.* at 639-642 (Rehnquist, J., dissenting) (criticizing the linkage of the *Jackson* no-waiver rule to a request for counsel when the right to counsel does not depend on a request for counsel).

Fifth Amendment are adequately deterred by excluding improperly obtained evidence from the government's case in chief. In *Harris* v. *New York, supra*, the Court allowed a defendant's trial testimony about a series of drug sales he made to an undercover officer to be impeached on cross-examination with statements the defendant made immediately after arrest and before receiving *Miranda* warnings. The Court came to an identical conclusion in *Oregon* v. *Hass, supra*, where it allowed impeachment with inculpatory information taken from a suspect after he had been given *Miranda* warnings and had requested a lawyer. In both cases, the Court reasoned that where the circumstances do not indicate that a defendant's constitutional privilege against compelled self-incrimination has been violated,[7] the importance of the "search for truth in a criminal case" (*Hass*, 420 U.S. at 722) outweighs the deterrent value of extending the exclusion of evidence that is already barred from the prosecution's affirmative case. *Hass*, 420 U.S. at 722-724; *Harris*, 401 U.S. at 224-226.

The same balance must be struck in this case. The *Jackson* presumption—that if the government initiates an exchange with a defendant who has requested counsel the defendant cannot be found to have waived his Sixth Amendment right to counsel—is deliberately overbroad. Like *Miranda*'s "preventive medicine," it provides a remedy even to those defendants who have suffered no constitutional wrong. *Oregon* v. *Elstad*, 470 U.S. 298, 309 (1985). It is enough that *Jackson*, like *Miranda*, bars

---

[7] As we have noted (pages 12-13, *supra*), statements taken in violation of the Fifth Amendment itself, rather than its prophylactic safeguards, can never be used at trial. *New Jersey* v. *Portash*, 440 U.S. 450 (1979). Because the use of compelled self-incriminating testimony violates the text of the Amendment, the Court has held that "[b]alancing [of the kind done in *Harris* and *Hass*] is not simply unnecessary. It is impermissible." *Portash*, 440 U.S. at 459.

the introduction in the government's case in chief of evidence obtained in violation of its rule.[8]

This Court's recent decision in *Patterson* v. *Illinois*, 108 S. Ct. 2389 (1988), underscores the strength of the analogy to *Harris* and *Hass* by emphasizing the close parallel between the principles governing the waiver of Fifth and Sixth Amendment rights in the case of uncounseled pretrial interrogations. The Court in *Patterson* held that in that setting Sixth Amendment rights are not intrinsically more difficult to waive than Fifth Amendment rights, and that the standard *Miranda* warnings are sufficient to support a waiver of both rights. 108 S. Ct. at 2398. As the Court explained, an attorney serves the same "limited purpose" in custodial interrogation whether the interrogation occurs before or after the initiation of formal charges. There is no "substantial difference between the usefulness of a lawyer to a suspect during custodial interrogation, and his value to an accused at postindictment questioning." *Ibid.*; see

---

[8] Once the balance has been struck allowing the use of improperly obtained evidence to impeach, the admission of the evidence in any particular case depends on whether it is clear that the defendant is aware of the right to counsel and yet voluntarily makes a statement. See *Johnson* v. *Zerbst*, 304 U.S. 458, 464 (1938) (establishing as standard for waivers of counsel that action must not only be voluntary, but must also constitute a knowing and intelligent "relinquishment or abandonment of a known right or privilege"). As the Court has decided in the Fifth Amendment context, any statement would be admissible for impeachment if it met this " 'old' due process voluntariness test." See *Oregon* v. *Elstad*, 470 U.S. 298, 308-309 (1985).

Respondent's waiver satisfied that standard. This Court's decision in *Patterson* v. *Illinois*, 108 S. Ct. 2389, 2397 (1988), makes it clear that *Miranda* warnings "sufficiently apprise[] [a defendant] of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights." Respondent received full *Miranda* warnings prior to his September 9 interview, and he indicated his understanding of them.

also *id.* at 2395-2396 & n.6; cf. *Ash*, 413 U.S. at 312. There should therefore be no difference in the consequences that follow the violation of the prophylactic rule established by *Miranda*, and those that follow the violation of the parallel prophylactic rule established by *Jackson*.[9]

CONCLUSION

The judgment of the Michigan Court of Appeals should be reversed.

Respectfully submitted.

WILLIAM C. BRYSON
Acting Solicitor General
EDWARD S.G. DENNIS, JR.
Assistant Attorney General
CHRISTINE DESAN HUSSON
Assistant to the Solicitor General
J. DOUGLAS WILSON
Attorney

APRIL 1989

---

[9] Although the issue is not before this Court, it is not even clear in this case that the police violated the rule of *Michigan* v. *Jackson*, *supra*. Although the matter is not developed in detail in the record, it appears that respondent initiated the exchange with the police on September 9 (see Pet. App. 3a; J.A. 32-33; Tr. 117) and that he received complete *Miranda* warnings, which were sufficient to justify a waiver of his Sixth Amendment rights (see *Patterson* v. *Illinois*, *supra*). While the Michigan Court of Appeals did not explain its reason for finding that *Michigan* v. *Jackson* had been violated, it may be that the court regarded respondent's reference to his lawyer as a request for counsel and the police officer's statement that respondent did not need to consult with his lawyer as constituting an initiation of interrogation despite a request for counsel, in violation of the *Jackson* rule.

☆ U.S. GOVERNMENT PRINTING OFFICE: 1989—241-699/00219

No. 88-512 (5)

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

STATE OF MICHIGAN,

Petitioner,

—v.—

TYRIS LEMONT HARVEY,

Respondent.

ON WRIT OF *CERTIORARI* TO THE MICHIGAN COURT OF APPEALS

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION AND THE ACLU OF MICHIGAN IN SUPPORT OF RESPONDENT

Steven R. Shapiro
(*Counsel of Record*)
Cedric Merlin Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Paul J. Denenfeld
ACLU Fund of Michigan
1701 David Whitney Building
1553 Woodward Avenue
Detroit, Michigan 48226
(313) 961-4662

36 pp

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER AUTHORITIES

INTEREST OF AMICI[1/]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan, membership organization dedicated to preserving the constitutional protections embodied in the Bill of Rights. The ACLU of Michigan is one of its statewide affiliates.

This case involves the meaning and scope of the right to counsel provided by the Sixth Amendment. Because the right to counsel is central to any constitutional vision of the appropriate relationship between the individual and state, the issues in this case are directly related to the organizational purposes of the ACLU.

1/ Letters of consent to the filing of this brief have been lodged with the Clerk pursuant to Rule 36.2.

STATEMENT OF THE CASE

The record in this case reveals a persistent effort by the police to elicit statements from the respondent in violation of his constitutional rights.

Respondent's first statement was made in the period following his arrest and before his arraignment on charges of first degree criminal sexual conduct. So far as the record reveals, he was never advised of his Miranda rights. (Pet.App.2a) His statement was nonetheless recorded by the police, who asked him to verify its accuracy by signing the bottom of each page. In response, respondent agreed to sign only the first page. Id. He refused to sign the final two pages because he did not believe they accurately reflected what he had said to the police. Id. Later that

same day, respondent was arraigned and counsel was appointed.

On September 9, 1986, six days before the commencement of trial, respondent informed the police that he wanted to make another statement. When he expressed some doubt as to whether he should make the statement in the absence of his lawyer, an officer told him that his attorney's presence was unnecessary since his statement would be recorded and a copy of the statement would be given to counsel. (Pet. App.3a)

Following this misleading exchange, respondent was asked to sign a form waiving his Miranda rights. As before, his response was a selective one. Thus, he initialed those sections of the form dealing with his right to remain silent, to have an attorney present during question-

ing, and to have counsel appointed if he could not afford one. Id. He did not initial the section of the form noting that any statement he made could be used against him, nor did he acknowledge his right to terminate questioning "at any time." (Pet.App.4a) Despite these omissions, respondent was asked if he understood his constitutional rights. He answered yes and then proceeded to give a detailed statement that was different from his first statement but, as the Michigan Court of Appeals noted, "essentially similar to his [subsequent] trial testimony." Id.

Neither statement was used by the prosecution during its case-in-chief. However, once respondent testified in his own behalf, the prosecution introduced both statements for impeachment purposes during

cross-examination. The signed page of the prearraignment statement was introduced without objection. Id. The postarraignment statement was admitted by the trial judge despite the prosecutor's concession that it had been obtained in violation of Miranda. (Pet.App.5a)

Following his conviction, respondent appealed to the Michigan Court of Appeals on the ground that neither statement should have been admitted for any purpose. The Court of Appeals agreed on one statement and disagreed on the other. Specifically, the court held that respondent's prearraignment statement had been voluntarily made under the Fifth Amendment and was therefore admissible as impeachment evi-

dence even if no Miranda warnings were given. (Pet.App.6a)[2/]

Respondent's second statement, by contrast, was declared inadmissible under the Sixth Amendment because it had been made following arraignment and after respondent had requested the assistance of counsel. (Pet.App.6a-7a)[3/] In addition, the court held that "[b]ecause this case involved a credibility contest between defendant and the victim, we cannot say that the error was harmless beyond a rea-

---

2/ Michigan law apparently allowed the appellate court to consider the admissibility of the first statement even though no contemporaneous objection had been made at trial.

3/ The court rejected respondent's Fifth Amendment objection to the use of the postarraignment statement on the theory that it had also been made voluntarily and thus was available for impeachment purposes under this Court's established precedents. Neither that issue nor the propriety of using respondent's prearraignment statement for impeachment purposes is now before this Court.

sonable doubt." (Pet.App.7a) The state's application for leave to appeal was denied by the Michigan Supreme Court. (Pet. App.8a)

SUMMARY OF ARGUMENT

The issue in this case is whether a statement taken in violation of the Sixth Amendment right to counsel can be used to impeach a defendant's credibility during trial.[4/]

For more than half a century, this Court has held that the right to counsel attaches at arraignment. See Powell v. Alabama, 287 U.S. 45 (1932). This Court has also held that the right to counsel can not be circumvented by strategies designed

---

4/ The Sixth Amendment provides in relevant part that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."

to encourage the defendant to make a post-arraignment statement in the absence of counsel. See e.g., Maine v. Moulton, 474 U.S. 159, 170-71 (1985); Massiah v. United States, 377 U.S. 201, 206 (1964). Finally, in Michigan v. Jackson, 475 U.S. 625, 636 (1986), this Court adopted the prophylactic rule that the right to counsel is not subject to waiver once invoked at "an arraignment or similar proceeding."

In urging reversal, the central contention of both petitioner and the Solicitor General is that the only rule that was violated in this case was the prophylactic rule of Michigan v. Jackson. Proceeding from this premise, both petitioner and the Solicitor General argue that the violation of such prophylactic rules does not justify the exclusion of otherwise reliable evidence for impeachment purposes. Cf. Harris

v. New York, 401 U.S. 222 (1971). This argument is flawed for several reasons.

First, it is simply not true that Michigan v. Jackson stands as the sole impediment to the use of respondent's post-arraignment statement in this case. Even without the benefit of the prophylactic rule announced in Michigan v. Jackson, the purported waiver of respondent's Sixth Amendment rights would have to be invalidated because it was the product of an affirmative misrepresentation by the police. Accordingly, it is unnecessary to resort to a prophylactic rule in order to conclude that respondent's waiver was neither knowing nor voluntary. See Johnson v. Zerbst, 304 U.S. 458 (1938).

Once it is acknowledged that Michigan v. Jackson is only an alternative basis for the holding below, this case becomes far

simpler and less controversial. Core violations of the Sixth Amendment, like core violations of the Fifth Amendment, have never been subject to a balancing test. See New Jersey v. Portash, 440 U.S. 450, 459 (1979). Otherwise, there would be little substance to this Court's assurance that the "Sixth Amendment guarantees the accused, at least after the initiation of formal charges, the right to rely on counsel as a 'medium' between him and the State." Maine v. Moulton, 474 U.S. at 176.

It is precisely because the Sixth Amendment affects the integrity of the trial process itself that petitioner's effort to draw an analogy with the Fourth Amendment does not work. In a Fourth Amendment context, the exclusionary rule is used to promote values that are separate and apart from the trial process. Under

those circumstances, this Court has been willing to balance the deterrent gain against the adjudicatory loss.

This Court has not adopted a cost-benefit approach when the constitutional violation relates to the integrity of the adjudicatory process itself. For example, the Fifth Amendment bar against self-incrimination cannot be breached for any purpose, even when there is reason to believe that a defendant's "compelled" testimony is entirely reliable and thus likely to enhance the factfinding process. New Jersey v. Portash, supra. Similarly, a defendant's right to trial by jury cannot be sacrificed merely because other methods of conducting a trial may be more efficient and, indeed, perhaps even more likely to discover the "truth."

At bottom, petitioner's real quarrel is not with the ruling below but with this Court's Sixth Amendment jurisprudence. That jurisprudence is both well-settled and well-grounded. In any event, it is not properly subject to reconsideration in this case given the limited question presented for review.

ARGUMENT

I. RESPONDENT'S SIXTH AMENDMENT RIGHTS WERE VIOLATED IN THIS CASE BY THE USE OF DECEPTIVE POLICE TACTICS TO OBTAIN A POSTARRAIGNMENT STATEMENT WITHOUT THE BENEFIT OF COUNSEL

In a series of cases over the past half-century, this Court has repeatedly held that the right to counsel attaches at arraignment, which this Court has properly recognized as a critical stage of the criminal proceeding. See e.g., Michigan v. Jackson, 475 U.S. at 629; Maine v. Moulton,

474 U.S. at 170-71; United States v. Gouveia, 467 U.S. 180, 187-89 (1984); Brewer v. Williams, 430 U.S. 387, 398 (1977); Kirby v. Illinois, 406 U.S. 682, 689 (1972); Massiah v. United States, 377 U.S. at 205; Johnson v. Zerbst, 304 U.S. at 462-63; Powell v. Alabama, 287 U.S. at 57.

The rationale for this right is also well-established. The decision to proceed with arraignment indicates that

> the government has committed itself to prosecute, and . . . that the adverse positions of government and defendant have solidified. It is then that a defendant finds himself faced with the prosecutorial forces of organized society, and immersed in the intricacies of substantive and procedural criminal law.

Kirby v. Illinois, 406 U.S. at 689.

Accordingly, the police may not interrogate an uncounseled defendant after arraignment unless the defendant has validly waived his right to representation.

Furthermore, the police may not trick a defendant into speaking by creating a scenario in which the defendant is led to believe that the presence of counsel is unimportant. This rule against chicanery is hardly unique to Sixth Amendment law. Properly understood, it is merely a re-statement of the general principle that the waiver of constitutional rights must be knowing and voluntary. See Johnson v. Zerbst, supra. At the same time, it has special poignancy in the counsel context since one of the functions of counsel in our adversary system is to even the scales between the state and the often untutored defendant it is trying to prosecute.

Seen in this light, the facts of this case fit squarely within the line of cases holding that the police may not use an informant to elicit testimony from a

defendant who is represented by counsel and who, in many instances, would not voluntarily speak to the police without counsel being present. See Kuhlmann v. Wilson, 477 U.S. 436 (1986); Maine v. Moulton, supra; United States v. Henry, 447 U.S. 264 (1980); Massiah v. United States, supra.

Petitioner characterizes these cases as mere "informant" cases in an effort to distinguish them. (Pet.Br. at 29) In fact, they stand for a larger principle. As this Court expressed it in Maine v. Moulton, 474 U.S. at 176, any "knowing exploitation by the State of an opportunity to confront the accused without counsel being present is as much a breach of the State's obligation not to circumvent the right to the assistance of counsel as is

the intentional creation of such an opportunity."5/

That, of course, is precisely what occurred in this case. Once respondent expressed a desire to talk to the police, the police "knowing[ly] exploit[ed]" the opportunity that had fallen into their lap by deliberately misinforming respondent about the need to have counsel present. If anything, that deception is even worse than what occurred in the "informant" cases, where the constitutional sin was one of omission rather than commission. Likewise, this case is more troubling than Brewer v. Williams, 430 U.S. 387, where the police

---

5/ Petitioner devotes a large portion of its brief to arguing that Massiah was wrongly decided. (Pet. Br. at 21-52) However, as petitioner candidly acknowledges, this Court has reaffirmed Massiah at least three times during the past decade. See p.15, supra. Moreover, the continuing validity of Massiah is not included within the question presented for review by this Court.

encouraged a defendant to confess through use of the so-called "Christian burial" speech while the defendant was being transported, without counsel, from one city to another after his arraignment. At worst, the police in Brewer were guilty of a psychological ploy that was undoubtedly made easier by the absence of counsel. Here, the police engaged in an intentional misrepresentation that went to the very heart of respondent's Sixth Amendment rights.

It is hardly surprising, therefore, that the prosecution made no effort to use respondent's postarraignment statement during its case-in-chief. The Sixth Amendment violation could not have been clearer. The confusion in this case has largely arisen at the appellate level. In an effort to preserve its conviction, petitioner has constructed an argument, now

joined by the Solicitor General, that the police misconduct in this case did not violate respondent's core Sixth Amendment rights but only the prophylactic rule announced in Michigan v. Jackson. That contention is unpersuasive.

Jackson holds that the right to counsel can never be waived after arraignment regardless of the circumstances under which the arraignment is obtained. Put another way, the rule in Jackson would invalidate a postarraignment waiver even if the waiver could fairly be described as knowing and voluntary by every other objective criteria. That predicate does not exist here. The Sixth Amendment violation in this case is not a product of Jackson, although Jackson was surely violated as well. Rather, the crux of the Sixth Amendment violation in this case is that

respondent was misled into waiving his right to counsel by the deliberately false and manipulative statement that counsel was unnecessary. Given that deliberate misrepresentation, respondent's waiver could not possibly be sustained under conventional waiver theory, even without the benefit of Michigan v. Jackson.[6/]

In short, it is important to understand that the Sixth Amendment itself was violated in this case, not merely a prophylactic rule created by this Court.

6/ See Carnley v. Cochran, 369 U.S. 506, 514 (1962)("'courts [should] indulge every reasonable presumption against waiver' of fundamental constitutional rights"); Moore v. Michigan, 355 U.S. 155, 161 (1957)("[w]here the right to counsel is of such critical importance as to be an element of Due Process under the Fourteenth Amendment, a finding of waiver is not lightly to be made"); Johnson v. Zerbst, 304 U.S. at 468; cf. Moran v. Burbine, 475 U.S. 412, 423 n.1 (1986); Michigan v. Mosley, 423 U.S. 96, 104 n.10 (1975).

II. STATEMENTS OBTAINED IN VIOLATION OF CORE SIXTH AMENDMENT RIGHTS SHOULD NOT BE ADMISSIBLE FOR ANY PURPOSE, INCLUDING IMPEACHMENT

Prophylactic rules exist to enforce constitutional guarantees. When prophylactic rules are violated, this Court has occasionally resorted to a cost-benefit approach in determining whether the prophylactic rule should be strictly construed. Constitutional rights, however, are not created by this Court and cannot be bargained away in pursuit of some other social goal. To the extent that the enforcement of those rights involves a weighing of interests, that balance was struck when the Constitution was written. Cf. Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, 425 U.S. 748, 770 (1976). Accordingly, this Court has consistently distinguished between prophylactic rules and core constitutional values.

And when the constitutional values concern the trial process itself, this Court has been steadfast in its refusal to allow any use of tainted evidence.

Thus, in New Jersey v. Portash, 440 U.S. 450, this Court refused to engage in the very same balancing that petitioner advocates here. The precise issue in Portash was whether, despite the Fifth Amendment's prohibition against compulsory self-incrimination, a prosecutor could use legislatively immunized grand jury testimony for impeachment purposes in a criminal trial. This Court ruled against the use of such evidence, holding that testimony given in response to a grant of legislative immunity is "the essence of coerced testimony," 440 U.S. at 459, and therefore unavailable for any purpose.

The holding in Portash was not based solely on this Court's concern that compelled statements are inherently unreliable. Instead, this Court justified its holding on much broader grounds: "[A] defendant's compelled statements, as opposed to statements taken in violation of Miranda, may not be put to any testimonial use whatever against him in a criminal trial." 440 U.S. at 459. This is because "[t]he Fifth and Fourteenth Amendments provide a privilege against compelled self-incrimination, not merely against unreliable self-incrimination." Id. (emphasis in original).

The Sixth Amendment right to counsel is equally vital and equally protected by the Constitution. Applying this Court's analysis in Portash, therefore, the Michigan Supreme Court has held that "the right

to counsel [is] of such fundamental importance that it [is] unnecessary . . . to . . . balance the violation of this right against condoning perjury . . . . [R]egardless of other considerations the right to counsel is so important that it must automatically be accorded the greatest protection." People v. Gonyea, 421 Mich. 462, 479 (1984).1/ Accord, Meadows v. Kuhlmann, 812 F.2d 72 (2d Cir.), cert. denied, 482 U.S. 915 (1987); United States v. Brown, 699 F.2d 585 (2d Cir. 1983); Bishop v. Rose, 701 F.2d 1150 (6th Cir. 1983); People v. Knippenberg, 66 Ill.2d 276 (1977).

Contrary to petitioner's view, this Court's decisions in Harris v. New York, 401 U.S. 222 (1971), and Oregon v. Hass,

---

1/ The decision in Gonyea was based on state constitutional grounds. It was nevertheless relied on as persuasive precedent by the court below. (Pet.App.7a)

420 U.S. 714 (1975), are entirely consistent with that approach. Both cases involved the use of statements obtained in violation of Miranda to impeach a defendant's testimony at trial. Neither case involved the violation of a substantive constitutional right. That distinction is crucial, as this Court explained in Portash:

> Balancing of interests was thought to be necessary in Harris and Hass when the attempt to deter unlawful police conduct collided with the need to prevent perjury. Here, by contrast, we deal with the constitutional privilege against compulsory self-incrimination in its most pristine form. Balancing, therefore, is not simply unnecessary. It is impermissible.

440 U.S. at 459.[8/]

8/ See Michigan v. Tucker, 417 U.S. 433, 444 (1974) (Miranda warnings are "not themselves rights protected by the Constitution but [are] instead measures to insure that the right against compulsory self-incrimination [is] protected").

The constitutional distinction between Miranda, and the Fifth and Sixth Amendment rights it is meant to protect, has also been noted by Professor Kamisar:

> Massiah [and the Sixth Amendment] make[] clear that once adversary proceedings have commenced against an individual, government efforts to elicit incriminating statements, whether done openly in the police station or "indirectly and surreptitiously," violate the individual's right to counsel. But when the government attempts to elicit incriminating statements from an individual before adversary proceedings have commenced against him, it is not necessarily violating his right to counsel. For in the absence of other factors, such as an inherently compelling interrogation environment [which the Fifth Amendment expressly forbids], an individual is not entitled to counsel whenever he is subjected to an "interrogation," but only when such interrogations take place at or after commencement of adversary proceedings [when the Sixth Amendment is triggered].

Kamisar, Brewer v. Williams, Massiah, and Miranda: What Is "Interrogation"? When

Does It Matter?, 67 Geo.L.J. 1, 66 (1978) (emphasis added).

Petitioner's failure to grapple with the critical distinction between prophylactic rules and core constitutional values pervades its argument and cannot be rescued by drawing analogies with the Fourth Amendment. Amici acknowledge that evidence obtained in violation of the Fourth Amendment may be used for impeachment purposes. See Walder v. United States, 347 U.S. 62 (1954). The Fourth Amendment, however, is not designed to preserve the integrity of the trial process. Recognizing that fact, this Court has been willing to consider whether the deterrent value of the exclusionary rule justifies the loss of potentially relevant evidence in particular cases. Compare Mapp v. Ohio, 367 U.S. 643 (1961),

with United States v. Leon, 468 U.S. 897 (1984).

Here, the Sixth Amendment interest at stake -- like the Fifth Amendment interest at stake in New Jersey v. Portash -- is inextricably tied to our sense of a fair adversarial process. Nor is "truth" the only goal of that process, as the Solicitor General suggests in his brief. Fairness values are also important and were embodied by the framers in the Fifth and Sixth Amendments.

The rights guaranteed by these amendments have never been subject to the sort of balancing test that petitioner proposes. For example, no one would seriously argue that a defendant's right to trial by jury can be sacrificed merely because other methods of conducting a trial may be more efficient and, indeed, perhaps even more

likely to discover the "truth." Faced with the very same argument that petitioner now makes, the Sixth Circuit wrote: "Our concern is with a constitutional right which is at the heart of our adversary system of criminal justice." Bishop v. Rose, 701 F.2d at 1157.

It is, moreover, for precisely that reason that this Court should reject petitioner's effort to portray the rule it is seeking as a minor intrusion on the Sixth Amendment. In truth, petitioner's approach would substantially undermine the right to counsel that this Court has recognized as "essential to any fair trial of a case against a prisoner." Powell v. Alabama, 287 U.S. at 70.

In the instant case, respondent was misinformed by the police about the necessity of conferring with counsel before he

made his postarraignment statement. As a result, he was deprived of a vital constitutional right during the critical stages of the criminal justice process "where the results might well settle the accused's fate and reduce the trial itself to a mere formality." Maine v. Moulton, 475 U.S. at 170 (citations omitted).

The essence of the constitutional guarantee of the right to counsel is to permit a defendant to make an informed decision amongst a myriad of procedural and substantive choices. See Powell v. Alabama, 287 U.S. at 69. To admit evidence that is inherently tainted due to the lack of an informed decision by the defendant would largely defeat the constitutional guarantee embodied in the Sixth Amendment.

Recognizing the great pressure on law enforcement officers, this Court has

observed: "[I]t is precisely the predictability of those pressures that makes imperative a resolute loyalty to the guarantees that the Constitution extends to us all." Brewer v. Williams, 430 U.S. at 406. Unfortunately, petitioner's rule would encourage exactly the sort of police misconduct that this record reveals. As this Court has asked in analogous circumstances, "[W]hat use is a defendant's right to effective counsel at every stage of a criminal case if, while he is held awaiting trial, he can be questioned in the absence of counsel until he confesses?" Maine v. Moulton, 474 U.S. at 171 (citation omitted). While perhaps not quite as stark, this case poses an equivalent problem.

CONCLUSION

For the reasons stated herein, the decision below should be affirmed.

Respectfully submitted,

Steven R. Shapiro
(Counsel of Record)
Cedric Merlin Powell
American Civil Liberties
Union Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Paul J. Denenfeld
ACLU Fund of Michigan
1701 David Whitney Bldg.
1553 Woodward Avenue
Detroit, Michigan 48226
(313) 961-4662

Dated: May 15, 1989